STATE OF MICHIGAN
IN THE SUPREME COURT

TOWNSHIP OF FRASER,
Plaintiff/Appellant,

v.

HARVEY HANEY and
RUTH ANN HANEY,
Defendants/Appellees
_____/

Supreme Court Case No.: 160991
Court of Appeals Case No.: 337842
Circuit Court Case No.: 16-3272-CH

BIRCHLER, FITZHUGH, PURTELL, & BRISSETTE, PLC
MARK J. BRISSETTE (P26982)
Attorney for Plaintiff/Appellant
900 Center Ave
Bay City, MI 48708
(989) 892-0591

OUTSIDE LEGAL COUNSEL PLC
PHILIP L. ELLISON (P74117)
Attorney for Defendants/Appellees
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Hemlock, MI 48626
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HANEY APPELLEES' APPENDIX

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Name	Case Number	Petition #
HANEY, HARVEY	16003272 CH 09	

ENTRY DATE	PROCEEDINGS	ACTION DATE
05-03-2016	SUMMONS AND COMPLAINT	
05-03-2016	COMPLAINT	
05-03-2016	MTN FOR PRELIMINARY INJUNCTION	
05-03-2016	AFFIDAVIT OF T FOUCHEA IN	
05-03-2016	-SUPPORT OF PLTF MTN FOR	
05-03-2016	-PRELIMINARY INJUNCTION	
05-03-2016	NOTICE OF HRG FILED	
05-03-2016	MOTION HEARING: 06/06/2016 11:00AM	06-06-2016
05-03-2016	GILL,HARRY P.,	
05-03-2016	-MTN FOR PRELIMINARY	
05-03-2016	-INJUNCTION	
05-04-2016	RETURN OF SERVICE	
05-04-2016	(PERSONAL SERVICE)	
05-04-2016	(FILED ON 5/6/16)	
05-05-2016	RETURN OF SERVICE	
05-05-2016	(PERSONAL SERVICE)	
05-05-2016	(FILED ON 5/6/16)	
05-25-2016	APPEARANCE	
05-25-2016	ATTORNEY PRESENT: HIGGS	
05-25-2016	APPEARANCE	
05-25-2016	ATTORNEY PRESENT: HIGGS	
05-25-2016	ANSWER FILED	
05-25-2016	ANSWER FILED	
05-25-2016	PROOF OF SERVICE FILED	
05-25-2016	RESPONSE IN OPPOSITION TO	
05-25-2016	-MOTION FOR PRELIMINARY	
05-25-2016	-INJUNCTION	
05-25-2016	AFFIRMATIVES DEFENSES	
05-25-2016	BRIEF IN OPPOSITION TO PLTFS	
05-25-2016	-MOTION FOR PRELIMINARY	
05-25-2016	-INJUNCTION	
06-07-2016	SET CASE ON CALENDAR	
06-07-2016	MOTION HEARING: 07/13/2016 1:00PM	07-13-2016
06-07-2016	GILL,HARRY P.,	
06-07-2016	-(PRELIMINARY INJUNCTION)	

06-07-2016	ORDER ORDERING 6/6/16 HEARING	
06-07-2016	-FOLLOWING IN-CHAMBERS	
06-07-2016	-CONFERENCE AND NOTICE OF NEW	
06-07-2016	-DATE	
06-13-2016	SCHEDULING ORDER	
06-13-2016	SETTLEMENT CONFERENCE: 11/15/2016 9:30AM	11-15-2016
06-13-2016	GILL,HARRY P.,	
06-22-2016	PROOF OF SERVICE FILED	
06-30-2016	REMOVE SCHEDULED EVENT	
06-30-2016	SETTLEMENT CONFERENCE: 11/15/2016 9:30AM	11-15-2016
06-30-2016	GILL,HARRY P.,	
06-30-2016	STIPULATION TO ADJOURN	
06-30-2016	-STATUS/SETTLEMENT CONFERENCE	
06-30-2016	ORDER ADJOURNING STATUS/	
06-30-2016	-SETTLEMENT CONFERENCE AND	
06-30-2016	-NOTICE OF NEW DATE	
06-30-2016	SET CASE ON CALENDAR	
06-30-2016	SETTLEMENT CONFERENCE: 12/20/2016 10:00AM	12-20-2016
06-30-2016	GILL,HARRY P.,	
06-30-2016	MISCELLANEOUS ACTION BY JUDGE	
06-30-2016	-7/13/16 PRELIMINARY	
06-30-2016	-INJUNCTION MOTION SCHEDULED	
06-30-2016	-FOR 1PM HAS BEEN RESCHEDULED	
06-30-2016	-TO BEGIN AT 8:30AM THE SAME	
06-30-2016	-DAY,ALLOWING THE PARTIES TO	
06-30-2016	-CONTINUE INTO THE AFTERNOON	
06-30-2016	-AS IT WAS INDICATED A WHOLE	
06-30-2016	-DAY IS ANTICIPATED;	
06-30-2016	CASE ACTIVITY REPORT	
06-30-2016	MOTION HEARING: 07/13/2016 8:30AM	07-13-2016
06-30-2016	GILL,HARRY P.,	
06-30-2016	-(PRELIMINARY INJUNCTION)	
06-30-2016	REMOVE SCHEDULED EVENT	
06-30-2016	MOTION HEARING: 07/13/2016 1:00PM	07-13-2016
06-30-2016	GILL,HARRY P.,	
07-01-2016	PLTF'S WITNESS LIST	
07-01-2016	PROOF OF SERVICE (X2)	
07-13-2016	SET CASE ON CALENDAR	
07-13-2016	MISCELLANOUS HEARING: 09/27/2016 8:30AM	09-27-2016

07-13-2016	GILL,HARRY P.,	
07-13-2016	(PRELIMINARY INJUCTION)	
07-13-2016	SET CASE ON CALENDAR	
07-13-2016	MISCELLANOUS HEARING: 09/28/2016 8:30AM	09-28-2016
07-13-2016	GILL,HARRY P.,	
07-13-2016	(PRELIMINARY INJUCTION)	
09-27-2016	MISCELLANOUS HEARING	
09-27-2016	(PRELINARY INJUCTION)	
09-27-2016	-PARTIES PRESENT W/COUNSEL;	
09-27-2016	-HEARING COMMENDED;	
09-27-2016	-ADJOURNED PLTF RAISED ISSUE	
09-27-2016	-OF RES JUDICATA;	
09-27-2016	-SEE SCHEDULING ORDER;	
09-27-2016		
09-27-2016	ACTION IN COURT FILED	
09-27-2016	SCHEDULING ORDER	
09-27-2016	MOTION FOR SUMMARY DISPOSITION: 11/29/2016 3:00PM	11-29-2016
09-27-2016	GILL,HARRY P.,	
09-30-2016	MOTION FILED	
09-30-2016	MOTION FOR SUMMARY DISPOSITION: 11/29/2016 3:00PM	11-29-2016
09-30-2016	GILL,HARRY P.,	
09-30-2016	NOTICE OF HEARING	
09-30-2016	PROOF OF SERVICE	
09-30-2016	BRIEF IN SUPPORT	
11-07-2016	MOTION FILED	
11-07-2016	MOTION HEARING: 11/21/2016 10:00AM	11-21-2016
11-07-2016	GILL,HARRY P.,	
11-07-2016	-MTN TO ADJOURN PLTF'S SD MTN	
11-07-2016	-DUE TO RETENTION OF NEW	
11-07-2016	-COUNSEL (DEFT: H HANEY)	
11-07-2016	NTC OF HEARING	
11-07-2016	NTC OF APPEARANCE (DEFT:	
11-07-2016	-HARVEY HANEY, NO SOA PRESENT)	
11-14-2016	SUBSTITUTION OF ATTORNEY	
11-14-2016	ATTORNEY PRESENT: ELLISON	
11-14-2016	FROM: HIGGS,KIM A.,	
11-14-2016	TO: ELLISON,PHILIP LEE,	
11-17-2016	PROOF OF SERVICE FILED	
11-17-2016	PLTF'S REPLY TO DEFT'S MTN TO	

11-17-2016	-ADJOURN PLTF'S SUMMARY	
11-17-2016	-DISPOSITION MTN DUE TO THE	
11-17-2016	-RETENTION OF NEW COUNSEL	
11-18-2016	PROOF OF SERVICE FILED	
11-21-2016	DEFTS' OPPOSITION TO PLTF'S	
11-21-2016	-MOTION FOR SUMMARY	
11-21-2016	-DISPOSTION PURSUANT TO	
11-21-2016	-MCR 2.116(C)(7) & DEFTS'	
11-21-2016	-COUNTER MOTION FOR SUMMARY	
11-21-2016	-DISPOSITION PURSUANT TO	
11-21-2016	-MCR 2.116(I)(1)(2)	
11-21-2016	AFFIDAVIT OF HARVEY HANEY	
11-21-2016	MOTION HEARING	
11-21-2016	-ALL PARTIES PRESENT;	
11-21-2016	-PLTF MTN TO ADJOURN SUMMARY	
11-21-2016	-DISPOSITION MTN DUE TO	
11-21-2016	-RETENTION OF NEW COUNSEL;	
11-21-2016	-MTN FOR SUMMARY DISPOSITION	
11-21-2016	-SET FOR 1/5/17 @ 1:00 PM;	
11-21-2016	-MR ELLISON TO NTC UP HIS	
11-21-2016	-MOTION FOR SUMMARY;	
11-21-2016	-MR BRISSETTE TO RE-NTC HIS	
11-21-2016	-MOTION FOR SUMMARY;	
11-21-2016		
11-21-2016	ACTION IN COURT FILED	
11-21-2016	MOTION FOR SUMMARY DISPOSITION: 01/05/2017 1:00PM	01-05-2017
11-21-2016	GILL,HARRY P.,	
11-21-2016	PROOF OF SERVICE FILED	
11-21-2016	RE-NTC OF HEARING (1/5/17,	
11-21-2016	-PLTF MTN FOR SUMMARY DISP)	
11-28-2016	DISCOVERY REQUEST-11/16/16	
11-28-2016	SET CASE ON CALENDAR	
11-28-2016	MISCELLANOUS HEARING: 01/05/2017 1:01PM	01-05-2017
11-28-2016	GILL,HARRY P.,	
11-28-2016	-(DEFT OBJ TO PLTF MTN FOR SD	
11-28-2016	-& DEFT COUNTER MTN FOR SD)	
11-28-2016	RE-NTC OF HRG	
11-28-2016	PROOF OF SERVICE	
12-16-2016	MOTION FILED	

12-16-2016	MOTION HEARING: 01/05/2017 1:02PM	01-05-2017
12-16-2016	GILL,HARRY P.,	
12-16-2016	MOTION FOR PROTECTIVE ORDER	
12-16-2016	NOTICE OF HEARING	
12-16-2016	PROOF OF SERVICE	
12-16-2016	PROOF OF SERVICE FILED	
12-20-2016	SET CASE ON CALENDAR	
12-20-2016	MOTION HEARING: 01/25/2017 3:00PM	01-25-2017
12-20-2016	GILL,HARRY P.,	
12-20-2016	(MOTION FOR PROTECTIVE ORDER)	
12-20-2016	RE-NOTICE OF HEARING	
12-20-2016	REMOVE SCHEDULED EVENT	
12-20-2016	MOTION HEARING: 01/05/2017 1:02PM	01-05-2017
12-20-2016	GILL,HARRY P.,	
12-20-2016	SET CASE ON CALENDAR	
12-20-2016	MOTION FOR SUMMARY DISPOSITION: 01/25/2017 3:01PM	01-25-2017
12-20-2016	GILL,HARRY P.,	
12-20-2016	RE-NOTICE OF HEARING	
12-20-2016	REMOVE SCHEDULED EVENT	
12-20-2016	MOTION FOR SUMMARY DISPOSITION: 01/05/2017 1:00PM	01-05-2017
12-20-2016	GILL,HARRY P.,	
12-20-2016	PROOF OF SERVICE FILED	
12-27-2016	SET CASE ON CALENDAR	
12-27-2016	MISCELLANOUS HEARING: 01/25/2017 3:02PM	01-25-2017
12-27-2016	GILL,HARRY P.,	
12-27-2016	-DEFT OPPOSITION TO PLTF MTN	
12-27-2016	-FOR PROTECTIVE ORDER & DEFT	
12-27-2016	-CROSS-MTN TO COMPEL DISCOVERY	
12-27-2016	RE-NTC OF HEARING	
12-28-2016	MISCELLANEOUS ACTION BY JUDGE	
12-28-2016	-CAR: A SETTLEMENT CONFERENCE	
12-28-2016	-WAS SCHEDULED FOR DECEMBER	
12-28-2016	-20, 2016 @ 9:00 AM;	
12-28-2016	-THE SETTLEMENT CONFERENCE IS	
12-28-2016	-RESCHEDULED FOR: THURSDAY,	
12-28-2016	-FEBRUARY 23, 2017 @ 8:30;	
12-28-2016	CASE ACTIVITY REPORT	
12-28-2016	SETTLEMENT CONFERENCE: 02/23/2017 8:30AM	02-23-2017
12-28-2016	GILL,HARRY P.,	

01-11-2017	PLTF'S BRIEF IN OPPOSITION TO	
01-11-2017	-DEFT'S MOTION FOR SUMMARY	
01-11-2017	-DISPOSITION	
01-11-2017	PROOF OF SERVICE FILED	
01-23-2017	PROOF OF SERVICE	
01-23-2017	PLTF'S REPLY TO DEFT'S CROSS	
01-23-2017	-MOTION TO COMPEL DISCOVERY	
01-25-2017	MISCELLANEOUS ACTION BY JUDGE	
01-25-2017	-1/25/17 MOTIONS ARE	
01-25-2017	-RESCHEDULED TO THURSDAY	
01-25-2017	-2/23/17 AT 8:30AM;	
01-25-2017	-DATE AND TIME OF STATUS	
01-25-2017	-SETTLEMENT CONFERENCE FOR	
01-25-2017	-JUDICIAL ECONOMY;	
01-25-2017	REMOVE CALENDAR DATES	
01-25-2017	CASE ACTIVITY REPORT	
01-25-2017	MOTION FOR SUMMARY DISPOSITION: 02/23/2017 8:30AM	02-23-2017
01-25-2017	GILL,HARRY P.,	
01-25-2017	SET CASE ON CALENDAR	
01-25-2017	MOTION TO COMPEL: 02/23/2017 8:31AM	02-23-2017
01-25-2017	GILL,HARRY P.,	
01-25-2017	SET CASE ON CALENDAR	
01-25-2017	MOTION HEARING: 02/23/2017 8:32AM	02-23-2017
01-25-2017	GILL,HARRY P.,	
01-25-2017	-(FOR PROTECTIVE ORDER)	
01-25-2017	SET CASE ON CALENDAR	
01-25-2017	SETTLEMENT CONFERENCE: 02/23/2017 8:33AM	02-23-2017
01-25-2017	GILL,HARRY P.,	
02-22-2017	MISCELLANEOUS ACTION BY JUDGE	
02-22-2017	-CAR: 2/23/17 MOTIONS: MOTIONS	
02-22-2017	-FOR SUMMARY DISPOSITION,	
02-22-2017	-CROSS-MOTION TO COMPEL,	
02-22-2017	-MOTION FOR PROTECTIVE ORDER &	
02-22-2017	-SETTLEMENT CONFERENCE ARE	
02-22-2017	-RESCHEDULED TO FRIDAY, MARCH	
02-22-2017	-3, 2017 @ 2:00 PM BY THE	
02-22-2017	-COURT;	
02-22-2017	REMOVE CALENDAR DATES	
02-22-2017	CASE ACTIVITY REPORT	

02-22-2017	MOTION HEARING: 03/03/2017 2:00PM	03-03-2017
02-22-2017	GILL,HARRY P.,	
02-22-2017	-(MTN FOR SUMMARY, CROSS-MTN	
02-22-2017	-TO COMPEL, MTN FOR PROTECTIVE	
02-22-2017	-ORDER & SETTLEMENT CONF)	
03-01-2017	AMENDED PROOF OF MAILING	
03-03-2017	MOTION HEARING	
03-03-2017	-MOTION FOR PROTECTIVE ORDER:	
03-03-2017	-ADJOURNED;	
03-03-2017	-MOTION SUMMARY DISPOSITION:	
03-03-2017	-DENIED;	
03-03-2017	-OPPOSITION TO MOTION FOR	
03-03-2017	-PROTECTIVE ORDER: ADJOURNED;	
03-03-2017	-CROSS-MOTION TO COMPEL:	
03-03-2017	-TO BE RE-NOTICED;	
03-03-2017	-CROSS-MOTION FOR SUMMARY	
03-03-2017	-DISPOSITION BASED ON STATUTE	
03-03-2017	-OF LIMITATIONS AS TO TOWNSHIP	
03-03-2017	-GRANTED;	
03-03-2017	-SETTLEMENT CONFERENCE HELD IN	
03-03-2017	-CHAMBERS;	
03-03-2017	-SCHEDULING ORDER TO ISSUE BY	
03-03-2017	-THE COURT;	
03-03-2017		
03-07-2017	ACTION IN COURT FILED	
03-07-2017	SCHEDULING ORDER	
03-07-2017	SETTLEMENT CONFERENCE: 08/22/2017 1:30PM	08-22-2017
03-07-2017	GILL,HARRY P.,	
03-07-2017	SET CASE ON CALENDAR	
03-07-2017	NON-JURY TRIAL: 09/14/2017 8:30AM	09-14-2017
03-07-2017	GILL,HARRY P.,	
03-07-2017	SET CASE ON CALENDAR	
03-07-2017	NON-JURY TRIAL: 09/15/2017 8:30AM	09-15-2017
03-07-2017	GILL,HARRY P.,	
03-07-2017	-(DAY 2)	
03-09-2017	NOTICE OF ENTRY OF PROPOSED	
03-09-2017	-ORDER W/PROOF OF SERVICE	
03-09-2017	-(ORDER DENYING BOTH CROSS	
03-09-2017	-MOTIONS FOR SUMMARY	

03-09-2017	-DISPOSITION AND ADJOURNING	
03-09-2017	-DISPUTED DISCOVERY MATTERS	
03-09-2017	-TO A FUTURE DATE AT THE	
03-09-2017	-OPTION OF ANY PARTY)	
03-21-2017	ORDER DENYING BOTH CROSS	
03-21-2017	-MOTIONS FOR SUMMARY	
03-21-2017	-DISPOSITION AND ADJOURNING	
03-21-2017	-DISPUTED DISCOVERY MATTERS	
03-21-2017	-TO A FUTURE DATE AT THE	
03-21-2017	-OPTION OF ANY PARTY	

Case Search

Case Docket Number Search Results - 337842

Appellate Docket Sheet

COA Case Number: 337842

MSC Case Number: 160991

TOWNSHIP OF FRASER V HARVEY HANEY

1	FRASER TOWNSHIP OF Oral Argument: Y Timely: Y	PL-AE	RET	(26982) **BRISSETTE MARK J**
2	HANEY HARVEY Oral Argument: Y Timely: Y	DF-AT	RET	(74117) **ELLISON PHILIP L**
3	HANEY RUTH ANN	DF-AT	SAM	
4	MICHIGAN TOWNSHIPS ASSOCIATION	AC	RET	(46421) **THALL ROBERT E**

COA Status: Case Concluded; File Open **MSC Status:** Pending on Application

04/10/2017 1 App For Leave to Appeal - Civil
- Proof of Service Date: 04/10/2017
- Answer Due: 05/01/2017
- Fee Code: EPAY
- Filed By Pro Per

03/21/2017 2 Order Appealed From
- From: BAY CIRCUIT COURT
- Case Number: 16-003272-CH
- Trial Court Judge: 26321 GILL HARRY P
- Nature of Case:
  - Civil Miscellaneous

04/13/2017 3 Steno Certificate - Tr Request Received
- Date: 04/07/2017
- Reporter: 6965 - WALSH MARY EA
- Hearings:
  - 03/03/2017

04/17/2017 4 Notice Of Filing Transcript
- Date: 04/13/2017
- Reporter: 6965 - WALSH MARY EA
- Hearings:
  - 03/03/2017

04/17/2017 8 Transcript Filed By Party
- Date: 04/17/2017
- Reporter: 6965 - WALSH MARY EA
- Filed By Attorney: 74117 - ELLISON PHILIP L
- Hearings:
  - 03/03/2017

05/01/2017 5 Answer - Application
- Proof of Service Date: 04/27/2017
- Event No: 1 App For Leave to Appeal - Civil

For Party: 1 FRASER TOWNSHIP OF PL-AE
Filed By Attorney: 26982 - BRISSETTE MARK J

05/04/2017 6 Motion: Peremptory Reversal
Proof of Service Date: 05/04/2017
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 2 HANEY HARVEY DF-AT
Fee Code: EPAY
Answer Due: 06/08/2017

05/12/2017 7 Answer - Motion
Proof of Service Date: 05/10/2017
Event No: 6 Peremptory Reversal
For Party: 1 FRASER TOWNSHIP OF PL-AE
Filed By Attorney: 26982 - BRISSETTE MARK J

09/12/2017 11 Submitted on Motion Docket
Event: 1 App For Leave to Appeal - Civil
Event: 6 Peremptory Reversal
District: L
Item #: 1

09/18/2017 13 Order: Application - Grant
View document in PDF format
Event: 1 App For Leave to Appeal - Civil
Event: 6 Peremptory Reversal
Panel: MJK,PDO,SLB
Attorney: 74117 - ELLISON PHILIP L
Comments: Limited to issues raised. Motion for peremptory reversal is denied.

09/19/2017 14 Docketing Statement MCR 7.204H
For Party: 2 HANEY HARVEY DF-AT
Proof of Service Date: 09/19/2017
Filed By Attorney: 74117 - ELLISON PHILIP L

11/13/2017 15 Stips: Extend Time - AT Brief
Extend Until: 12/11/2017
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 2 HANEY HARVEY DF-AT
P/S Date: 11/13/2017

11/14/2017 16 Correspondence Sent
For Party: 2 HANEY HARVEY DF-AT
Attorney: 74117 - ELLISON PHILIP L
Comments: stip ltr sent with due date of bf

12/11/2017 17 Brief: Appellant
Proof of Service Date: 12/11/2017
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 2 HANEY HARVEY DF-AT

01/16/2018 18 Stips: Extend Time - AE Brief
Extend Until: 02/12/2018
Filed By Attorney: 26982 - BRISSETTE MARK J
For Party: 1 FRASER TOWNSHIP OF PL-AE
P/S Date: 01/09/2018

01/16/2018 19 Correspondence Sent
For Party: 1 FRASER TOWNSHIP OF PL-AE
Attorney: 26982 - BRISSETTE MARK J

Comments: stip ltr sent w/due date of bf

02/09/2018 20 Brief: Appellee

Proof of Service Date: 02/08/2018
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 26982 - BRISSETTE MARK J
For Party: 1 FRASER TOWNSHIP OF PL-AE
Comments: amended bf filed in event #57

02/12/2018 21 Noticed

Record: REQST
Mail Date: 02/13/2018

02/20/2018 22 Brief: Reply

Proof of Service Date: 02/20/2018
Oral Argument Requested:
Timely Filed: Y
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 2 HANEY HARVEY DF-AT
Comments: e-filing received on weekend, docketed as filed and served on the next business day

02/20/2018 23 Other

Date: 02/14/2018
For Party: 1 FRASER TOWNSHIP OF PL-AE
Attorney: 26982 - BRISSETTE MARK J
Comments: two corrected references in AE bf for typo error,stat of jurd & stand of review list AT s/b AE

02/20/2018 57 Brief: Amended - Appellee

Proof of Service Date: 02/20/2018
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 26982 - BRISSETTE MARK J
For Party: 1 FRASER TOWNSHIP OF PL-AE
Comments: amended for clerical error

02/27/2018 24 Record Filed

File Location:
Comments: 2 lcf;tr--bay circ

03/01/2018 26 Motion: Amicus Curiae Brief

Proof of Service Date: 03/01/2018
Filed By Attorney: 46421 - THALL ROBERT E
For Party: 4 MICHIGAN TOWNSHIPS ASSOCIATION AC
Fee Code: EPAY
Answer Due: 03/15/2018

03/05/2018 27 Motion: Motion

Proof of Service Date: 03/02/2018
Filed By Attorney: 26982 - BRISSETTE MARK J
For Party: 1 FRASER TOWNSHIP OF PL-AE
Answer Due: 03/09/2018
Comments: Mot for Leave to Reply to ATs Reply Bf

03/13/2018 28 Submitted on Administrative Motion Docket

Event: 27 Motion
District: L

03/16/2018 29 Order: Grant - Generic

View document in PDF format
Event: 27 Motion
Panel: MFG

Attorney: 26982 - BRISSETTE MARK J
Comments: Mot for leave to reply to ATs reply bf GRANTED;AE may file sup bf w/I 21 days;not exceed 10 pgs

03/16/2018 30 Answer - Motion
Proof of Service Date: 03/16/2018
Event No: 26 Amicus Curiae Brief
For Party: 2 HANEY HARVEY DF-AT
Filed By Attorney: 74117 - ELLISON PHILIP L

03/20/2018 31 Submitted on Administrative Motion Docket
Event: 26 Amicus Curiae Brief
District: L
Item #: 1

03/22/2018 32 Order: Amicus Brief - Grant
View document in PDF format
Event: 26 Amicus Curiae Brief
Panel: MFG
Attorney: 46421 - THALL ROBERT E
Comments: bf shall be filed w/i 21 days of order

04/04/2018 33 Brief: Supplemental Brief - AE
Proof of Service Date: 04/04/2018
Oral Argument Requested:
Timely Filed: Y
Filed By Attorney: 26982 - BRISSETTE MARK J
For Party: 1 FRASER TOWNSHIP OF PL-AE
Comments: Reply to AT Reply granted per order issued 3/16/18

04/12/2018 34 Brief: Amicus Curiae
Proof of Service Date: 04/12/2018
Oral Argument Requested:
Timely Filed:
Filed By Attorney: 46421 - THALL ROBERT E
For Party: 4 MICHIGAN TOWNSHIPS ASSOCIATION AC

04/27/2018 38 Motion: Motion
Proof of Service Date: 04/27/2018
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 2 HANEY HARVEY DF-AT
Fee Code: EPAY
Answer Due: 05/04/2018
Comments: Mot for Leave to File Response Bf to A/C Brief;bf filed w/mot

04/27/2018 41 Brief: Generic Brief
Proof of Service Date: 04/27/2018
Oral Argument Requested:
Timely Filed:
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 2 HANEY HARVEY DF-AT
Comments: Response bf to A/C bf;accepted for filing per 5/14/18 order

05/08/2018 39 Submitted on Administrative Motion Docket
Event: 38 Motion
District: L
Item #: 1

05/14/2018 40 Order: Grant - Generic
View document in PDF format
Event: 38 Motion
Panel: MFG

Attorney: 74117 - ELLISON PHILIP L
Comments: Mot for leave to file response bf to A/C b is GRANTED;resp bf sub w/mot accepted for filing

09/04/2018 47 Motion: Adjourn
Proof of Service Date: 09/04/2018
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 2 HANEY HARVEY DF-AT
Fee Code: EPAY
Answer Due: 09/11/2018

09/10/2018 50 Answer - Motion
Proof of Service Date: 09/06/2018
Event No: 47 Adjourn
For Party: 1 FRASER TOWNSHIP OF PL-AE
Filed By Attorney: 26982 - BRISSETTE MARK J

09/14/2018 53 Order: Adjourn from Call - Place Next Call
View document in PDF format
Event: 47 Adjourn
Panel: MJC,JEM,AL
Attorney: 74117 - ELLISON PHILIP L
Comments: Clk office directed to place on 1st available case call following 11/18 case call

09/17/2018 55 Taken off Case Call
Event: 44 Submitted on Case Call
Comments: Per Panel's Adjourn Order Issued 9/14/2018

09/18/2018 48 Submitted on Motion Docket Affecting Call
Event: 47 Adjourn
District: L
Item #: 1

10/02/2018 44 Submitted on Case Call
District: L
Item #: 6
Panel: MJC,JEM,AL
Comments: Removed From October Call; See Adjourn Order Issued 9/14/2018

12/12/2018 58 Submitted on Case Call
District: L
Item #: 25
Panel: BAS,DHS,AK

12/12/2018 59 Oral Argument Audio

12/20/2018 60 Opinion - Per Curiam - Unpublished
View document in PDF format
Pages: 8
Panel: BAS,DHS,AK
Result: Reversed and Remanded

12/21/2018 61 Bill of Costs Filed
Date: 12/21/2018
For Party: 2 HANEY HARVEY DF-AT
Attorney: 74117 - ELLISON PHILIP L

12/21/2018 62 Motion: Publication Request
Proof of Service Date: 12/21/2018
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 2 HANEY HARVEY DF-AT
Answer Due: 01/04/2019

01/08/2019 63 Submitted on Publication Docket

Event: 62 Publication Request
District: L

01/16/2019 64 Costs Taxed Per MCR 7.219
Fee: $897.00
For Party: 2 HANEY HARVEY DF-AT
Attorney: 74117 - ELLISON PHILIP L

01/17/2019 65 Publication Request - Granted
Event: 62 Publication Request
Panel: BAS,DHS,AK
Attorney: 74117 - ELLISON PHILIP L

01/17/2019 66 Opinion - Per Curiam - Published After Release
View document in PDF format
Pages: 8
Panel: BAS,DHS,AK
Result: Reversed and Remanded

02/05/2019 67 Copy Request Fulfilled
Date: 02/05/2019

02/27/2019 68 SCt: Application for Leave to SCt
Supreme Court No: 159181
Answer Due: 03/27/2019
Fee: Paid
Check No: 56008
For Party: 1
Attorney: 26982 - BRISSETTE MARK J

02/27/2019 69 SCt Case Caption
Proof Of Service Date: 02/27/2019

02/28/2019 70 Other
Date: 02/28/2019
For Party: 1 FRASER TOWNSHIP OF PL-AE
Attorney: 26982 - BRISSETTE MARK J
Comments: Notice of filing application for leave to appeal in the Supreme Court

03/19/2019 71 SCt: Answer - SCt Application/Complaint
Filing Date: 03/19/2019
For Party: 2 HANEY HARVEY DF-AT
Filed By Attorney: 74117 - ELLISON PHILIP L

03/29/2019 72 Supreme Court - Record Sent To
File Location:
Comments: sc#159181 2 lcf;tr

03/29/2019 73 SCt: Trial Court Record Received
1 tr; 2 files

06/20/2019 76 SCt: Amicus Curiae Brf - SCt Application/Complaint
Filing Date: 06/20/2019
For Party: 4 MICHIGAN TOWNSHIPS ASSOCIATION AC
Filed By Attorney: 46421 - THALL ROBERT E

09/09/2019 77 Michigan Appeals Reports Publication
327 Mich App 1

09/27/2019 78 SCt Order: Remand to COA
View document in PDF format
Comments: Remand to COA to address whether its published opinion in this case is consistent with Baker v Marshall, 323 Mich App 590 (2018).

09/27/2019 79 Supreme Court - File Ret`d by - Re-Open for Reconsideration

File Location: L

10/01/2019 80 Record Filed
File Location:
Comments: 2 lcf;tr--SC Remand

10/21/2019 81 Telephone Contact
For Party: 2 HANEY HARVEY DF-AT
Attorney: 74117 - ELLISON PHILIP L
Comments: Attorney Will Submit Additional Filing Fee - Dual Motion For Supplemental Briefing And Oral Argument Requires Two Fees

10/21/2019 82 Motion: Supplemental Brief
Proof of Service Date: 10/21/2019
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 2 HANEY HARVEY DF-AT
Fee Code: EPAY
Answer Due: 10/28/2019
Comments: On Remand

10/21/2019 83 Defective Filing Letter
Event: 82
Defect:
Fees: $100 Motion - Cured
Comments: Placed Phone Call Rather Than Send Letter

10/21/2019 84 Proof of Service - Generic
Date: 10/21/2019
For Party: 2 HANEY HARVEY DF-AT
Attorney: 74117 - ELLISON PHILIP L
Comments: Dual Motion Served On Attorney Brissette Via 1st Class Mail (pleading filed 10/19/2019, docketed as next business day)

10/21/2019 85 Motion: Oral Argument
Proof of Service Date: 10/21/2019
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 2 HANEY HARVEY DF-AT
Fee Code: EPAY
Answer Due: 10/28/2019
Comments: Same Pleading Attached To Evt#82

10/22/2019 94 Fee - Motion - Defect Cured
Fee: $100.00
For Party: 2 HANEY HARVEY DF-AT
Attorney: 74117 - ELLISON PHILIP L
Fee Code: EPAY
Comments: See Evt #82

10/23/2019 86 Defect Cured
Event: 82
P/S Date: 10/22/2019
Defect:
Fees: $100 Motion - Cured

10/23/2019 87 Re-Submitted Per Supreme Court Remand
District: L

10/23/2019 88 Submitted on Motion Docket Affecting Call
Event: 82 Supplemental Brief
Event: 85 Oral Argument
District: C

10/24/2019 92 Order: Supplemental Brief - Grant

View document in PDF format
Event: 82 Supplemental Brief
Event: 85 Oral Argument
Panel: BAS,DHS,AK
Attorney: 74117 - ELLISON PHILIP L
Extension Date: 11/07/2019
Comments: AT Sup Brf Due 11/7/2019; AE Response w/in 14 Days Of Proof/Serv Date of AT Brief; Motion For Oral Argument DENIED

10/24/2019 93 Telephone Contact
Comments: Left Messages At Attorneys' Offices Re Court's Order - Grant Supple Briefs; Denied Oral Argu

11/04/2019 95 Brief: Supplemental Brief - AT
Proof of Service Date: 11/04/2019
Timely Filed: Y
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 2 HANEY HARVEY DF-AT
Comments: On Remand; Accepted Per COA Order Issued 10/24/2019

11/04/2019 96 Motion: Motion
Proof of Service Date: 11/04/2019
Filed By Attorney: 74117 - ELLISON PHILIP L
For Party: 2 HANEY HARVEY DF-AT
Fee Code: EPAY
Answer Due: 11/11/2019
Comments: To Amend Affirmative Defenses

11/06/2019 97 Submitted on Motion Docket Affecting Call
Event: 96 Motion
District: C

11/15/2019 98 Motion: Motion
Proof of Service Date: 11/14/2019
Filed By Attorney: 26982 - BRISSETTE MARK J
For Party: 1 FRASER TOWNSHIP OF PL-AE
Requested Extension: 12/03/2019
Answer Due: 11/21/2019
Comments: Extend Time To File Response Brief

11/15/2019 99 Submitted on Motion Docket Affecting Call
Event: 98 Motion
District: C

11/25/2019 100 Order: Order - Generic
View document in PDF format
Event: 98 Motion
Panel: BAS,DHS,AK
Attorney: 26982 - BRISSETTE MARK J
Extension Date: 12/03/2019
Comments: Extend Time To File Response Brief

11/26/2019 101 Brief: Supplemental Brief - AE
Proof of Service Date: 11/26/2019
Timely Filed: Y
Filed By Attorney: 26982 - BRISSETTE MARK J
For Party: 1 FRASER TOWNSHIP OF PL-AE
Comments: 11-25-2019 COA order granted permission to file brief.

01/21/2020 103 Order: Deny - Generic
View document in PDF format
Event: 96 Motion

Panel: BAS,DHS,AK
Attorney: 74117 - ELLISON PHILIP L
Comments: Denied Mtn to Amend Affirmative Defenses. See order

01/21/2020 104 Opinion - On Remand SCt - Per Curiam - Published
View document in PDF format
Pages: 3
Panel: BAS,DHS,AK
Result: Reversed and Remanded
Comments: Defendant may tax costs.

01/22/2020 105 Bill of Costs Filed
Date: 01/22/2020
For Party: 2 HANEY HARVEY DF-AT
Attorney: 74117 - ELLISON PHILIP L

02/21/2020 107 SCt: Application for Leave to SCt
Supreme Court No: 160991
Answer Due: 03/20/2020
Fee: Paid
Check No: 57219
For Party: 1
Attorney: 26982 - BRISSETTE MARK J

02/21/2020 108 SCt Case Caption
Proof Of Service Date: 02/21/2020

02/25/2020 110 Other
Date: 02/20/2020
For Party: 1 FRASER TOWNSHIP OF PL-AE
Attorney: 26982 - BRISSETTE MARK J
Comments: Notice of filing for leave to appeal in the Supreme Court

03/02/2020 109 Costs Taxed Per MCR 7.219
Fee: $1,197.00
For Party: 2 HANEY HARVEY DF-AT
Attorney: 74117 - ELLISON PHILIP L

03/20/2020 111 SCt Motion: Housekeeping
Party: 2
Filed by Attorney: 74117 - ELLISON PHILIP L
Comments: Motion to extend time to 03-27-2020 to file answer

03/23/2020 112 SCt Order: Chief Justice - Grant
View document in PDF format
Comments: Grant motion of DFAEs to extend the time for filing their answer to 3-27-2020.

04/20/2020 113 SCt: Answer - SCt Application/Complaint
Filing Date: 04/20/2020
For Party: 2 HANEY HARVEY DF-AT
Filed By Attorney: 74117 - ELLISON PHILIP L

05/04/2020 114 Supreme Court - Record Sent To
File Location:
Comments: sc#160991 2 lcf;tr

05/04/2020 115 SCt: Trial Court Record Received
1 tr; 2 files

09/08/2020 116 SCt: Amicus Curiae Brf - SCt Application/Complaint
Filing Date: 09/08/2020
For Party: 4 MICHIGAN TOWNSHIPS ASSOCIATION AC
Filed By Attorney: 46421 - THALL ROBERT E

Comments: Michigan Township Association

09/21/2020 118 SCt Motion: Strike

Party: 2

Filed by Attorney: 74117 - ELLISON PHILIP L

Comments: Motion to strike AC brief

09/23/2020 119 SCt Order: Chief Justice - Deny

View document in PDF format

Comments: Deny DFAEs motion strike the AC brf of MI Twps Assn.

11/25/2020 122 SCt Order: Application - Grant

View document in PDF format

Comments: 20-min OA per side. Invited AC=MI Twp Assn, MI Muni League, Govt Law Section, Real Prop Law Section.

01/12/2021 123 SCt: SCt Brief - Appellant

Filing Date: 01/12/2021

For Party: 1 FRASER TOWNSHIP OF PL-AE

Filed By Attorney: 26982 - BRISSETTE MARK J

Case Listing Complete

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

FRASER TOWNSHIP,

Plaintiff,

v

FILE NO.: 16- 3272 CH G
HONORABLE HARRY P. GILL
(P P# 26321)

HARVEY HANEY and,
RUTH ANN HANEY,

Defendants.

STATE OF MICHIGAN
COUNTY OF BAY
ATTESTED
A TRUE COPY
CYNTHIA A. LUCZAK
CLERK OF CIRCUIT COURT
By
Deputy

BIRCHLER, FITZHUGH, PURTELL & BRISSETTE, PLC
BY: MARK J. BRISSETTE (P26982)
Attorney for Plaintiff
900 Center Avenue
Bay City, Michigan 48708
(989) 892-0591

HARVEY HANEY and RUTH ANN HANEY
In Pro Per
10 West Anderson Road
Linwood, Michigan 48634

COMPLAINT

NOW COMES the Plaintiff, by and through their attorneys, BIRCHLER, FITZHUGH, PURTELL & BRISSETTE, PLC, by MARK J. BRISSETTE, and makes the following Complaint:

1. Plaintiff is a Township organized under the laws of the State of Michigan which is located in Bay County.

2. Defendants own real estate in Fraser Township and are subject to the jurisdiction of this Court. Defendants' land description is described as:

> Commencing 30 feet West of the South 1/4 corner of Section; thence North 233 feet; thence West 480 feet; thence North 1092.32 feet; thence East 505.22 feet along the South 1/8 line; thence South 1322.98 feet to the Beginning. ALSO, COMMENCING 1322.80 feet North of the South 1/4 corner of Section; thence West 505.54 feet along the South 1/8 line; thence North 22.36 feet; thence West 180.55 feet to a Point 629 feet East of the West 1/8 line; thence North 247.62 feet; thence East 684.94 feet to a Point 269.96 feet North from beginning; thence East 115.59 feet; thence South 01°58' East 10.10 feet along the West line of Highway M-13; thence West 116.05 feet; thence South 260.01 feet to the Beginning. Section 27, Town 16 North, Range 4 East.

3. Defendants have a history in Fraser Township of illegal animal operations on the subject property. (An illegal cervidae complex (deer farm) which was ordered closed by Circuit Court Order).

4. The subject property is zoned C-3 (Commercial) and is in no way zoned for agriculture.

5. The Defendants have been known to raise Russian boars, which have been banned by the Michigan DNR.

6. The Defendants are raising approximately twenty (20) domestic hogs on said property.

7. Defendants' actions violate the zoning laws of Fraser Township and constitute a nuisance.

8. Defendant fenced his property illegally without obtaining a fence permit.

9. The ground Defendant has is saturated with deer and hog urine and feces creating a horrible stench and attraction for flies.

10. Plaintiff seeks enforcement of its zoning ordinance through this Court.

11. Plaintiff's zoning ordinance calls for actual attorney fees and costs to be imposed on a property owner who violates the zoning ordinance including by lien on the subject property.

WHEREFORE, Plaintiff requests that the Court issue a permanent injunction against Defendants barring them from raising hogs or other animals on the subject property that would violate Plaintiff's ordinance, order Defendant's fence be removed, order the ground be plowed and coated with a non-toxic material, and award Plaintiff attorney fees.

Dated: May 3, 2016

MARK J. BRISSETTE
Attorney for Plaintiff

Prepared by:
BIRCHLER, FITZHUGH, PURTELL & BRISSETTE, PLC
BY: MARK J. BRISSETTE (P26982)
900 Center Avenue
Bay City, Michigan 48708
(989) 892-0591

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

FRASER TOWNSHIP
Plaintiff,

v.

HARVEY HANEY and
RUTH ANN HARVEY,
Defendants
_____/

Case No.: 16-3272-CH
Honorable Harry P. Gill

OPPOSITION & CROSS MOTION

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pellison@olcplc.com

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7) & DEFENDANTS' COUNTER MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(I)(1)-(2)

NOW COMES Defendants HARVEY HANEY and RUTH ANN HARVEY, by counsel, and opposes Plaintiff Fraser Township's motion for summary disposition premised solely on the doctrines of res judicata and collateral estoppel and seeking dismissal of the lawsuit for this case being outside the applicable statute of limitations. The township is flatly in error about its legal position. The previous case it cites involves ranched deer and elk (*cervidae*[1]), which was litigated under the auspices of the *Privately Owned Cervidae Producers Marketing Act*, MCL 287.951 et seq ("POC Act"). The POC Act involves with the animal classifications that encompass "deer, elk, moose,

[1] Cervidae is a zoological or biological term to define any member of the deer family, typically comprising deer, caribou, elk, and moose. This cervidae classification is characterized by the bearing of antlers in the male or in both sexes. Obviously, a hog is not within the Cervidae classification for lack of antlers of any type.

reindeer, and caribou." MCL 287.952(f). It does not encompass hog or pigs in any way. *Id.* The POC Act requires owners of cervidae ranches *to comply* with local zoning regulations. In other words, this specific act permits local control in addition to state regulations and procedures for the raising, harvesting, and slaughter of ranched members of the cervidae family. Farming hogs, on the other hand, is not subject to the POC Act or any other direct regulatory oversight by a specific statute requiring compliance with local zoning laws as a condition of its existence or to obtain a state license/permit. Instead, the *Michigan Right to Farm Act* expressly requires Fraser Township for legally *forgo* prohibitions against farming and farming operations via zoning ordinances if in compliance with the RTFA's *Generally Accepted Agricultural and Management Practices.* See MCL 286.471 et seq. The Legislature has sent a clear message to those local governments (and this court) who wrongly interfere with GAAMP-compliant farms or farm operations: they are to be punished with court-ordered awards of *actual* attorney fees and costs. In simple terms, the Fraser Township Zoning Ordinance is a legal nullity (as applied) *if* Defendants are within the GAAMPs under the *Michigan Right to Farm Act*.[2] The RTFA, MCL 286.471 et seq., was intended to protect farmers from the threat of extinction caused by nuisance suits arising out of alleged violations of local zoning ordinances and other local land use regulations as well as from the threat of private nuisance suits. *Lima Twp v Bateson*, 302 Mich App 483, 495; 838 NW2d 898 (2013). If the RTFA's protection does apply, then any zoning ordinance "could not operate to bar [farmers] from engaging in the activity and [a plaintiff is] not entitled to injunctive relief." *Id.,* at 493. It is the central issue in this case.

[2] Defendants have pled the legal protections of the RTFA as an affirmative defense.

By the motion, Fraser Township confuses that a failed defense for privately own deer and elk under the POC Act somehow automatically equals a failed affirmative defense for hogs under the RTFA—with wholly separate regulatory schemes. Fraser Township is just flatly in error.

ARGUMENT

It is undisputed—Fraser Township has pled the instant case about *hogs*, not deer or elk, on Defendants' property. **See Compl**. Plaintiff has had hogs since 2006. **Exhibit J, ¶5**. The previous case attached by Fraser Township to its motion resulted in *the Michigan DNR* unsuccessfully obtaining any judicial order to prevent *deer and elk* on Defendants' property pursuant to the POC Act. **Exhibit D** (hereinafter the "Prior MDNR Case"). Instead, the Michigan DNR obtained a settlement and dismissal. **Exhibit E**. Prior to that, Mr. Haney was the subject of an administrative action (and judicial review of that decision) for having deer and elk after the State's non-renewal of a cervidae license for Defendant Harvey Haney. None of these cases 1.) involved Fraser Township as a named or participating party, 2.) involved hogs or hog operations, or 3.) involved a claim of nuisance—all were pursuant to the POC Act, which strictly covers only members of cervidae classification (i.e. deer, elk, moose, reindeer, and caribou). **See Exhibits A, B, C, D, and E**.[3] Critically, the current case is not pled under the auspices of the POC Act. Instead, Fraser Township is now claiming, in this case, its own local zoning ordinance prohibits the farming of hogs and hog-farming operations—via a

[3] Many of the attachments to Plaintiffs' motion are missing critical pages, including the caption listing the parties—a key element under res judicata and collateral estoppel. It is hoped this is a mere oversight. Full copies are attached to correct the error by Plaintiff.

claimed public nuisance.[4] Different case, different parties, different statute, different facts; res judicata and collateral estoppel do not apply.

STANDARD OF REVIEW

A party is entitled to summary disposition under MCR 2.116(C)(7) if the claims are barred because of res judicata. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004); see also *Jones v State Farm Mut Auto Ins Co*, 202 Mich App 393, 396; 509 NW2d 829 (1993). Same is true for collateral estoppel. *Lichon v American Universal Ins Co*, 435 Mich 408, 427 fn 14; 459 NW2d 288 (1990). Pursuant to MCR 2.116(C)(7), this Court considers the documentary evidence in a light most favorable to the nonmoving party when deciding the motion. *McFadden v Imus*, 192 Mich App 629, 632; 481 NW2d 812 (1992). However, if it appears to the court that the opposing party, rather than the moving party, is entitled to summary disposition on an issue, the court may render decision in favor of the opposing party. MCR 2.116(I)(2); see also *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009). When the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay. MCR 2.116(I)(1).

MEMORANDUM OF LAW

Fraser Township's brief in support is extremely light on citing and analyzing the applicable law it raises (i.e. res judicata and collateral estoppel), largely because Fraser Township cannot legal meet all the required elements needed under res judicata and

[4] Ironically, Judge Schmidt previously ruled that *Michigan's Right to Farm Act* is a valid defense arising out a nuisance action; this current case is pled as a nuisance action. **Exhibit D, p. 6**. The Prior MDNR Case was never pled as a nuisance action, and thus *Michigan's Right to Farm Act* was deemed not applicable. Instead, only another state (not local) law applied, *Privately Owned Cervidae Producers Marketing Act*, MCL 287.951 et seq.

collateral estoppel to successfully invoke these doctrines. Fraser Township seemingly hopes the Court fails to notice; Defendants' newly-retained counsel did not. However, the township missed, as a matter of law, that its pending suit is barred by the statute of limitations.

A party shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section. MCL 600.5801(1). Here, the period is six (6) years. MCL 600.5813. The prescribed period of limitations applies equally to all actions whether equitable or legal relief is sought. MCL 600.5815. Thusly, the six-year limitations period in MCL 600.5813 applies to a township's claim to obtain injunctive relief to abate any public nuisance. *Mills v Lehner*, unpublished decision of the Court of Appeals, issued Apr 15, 2015 (Docket No. 319644), slip op at *2 (copy attached as **Exhibit I**). The applicable timeline runs from when the act *first accrued*—not when the alleged harm later occurred. MCL 600.5801(1); MCL 600.5827 ("the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."). The township also cannot assert that a continuation of any wrong tolls or extends the statute because the Supreme Court "completely and retroactively abrogated the common-law continuing wrongs doctrine in the jurisprudence of Michigan, including in nuisance... cases." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 288; 769 NW2d 234 (2009).

The doctrine of res judicata "prevents multiple suits litigating the same *cause of action*." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). Res judicata

applies if (1) the prior action was decided on the merits, (2) the prior decision resulted in a final judgment, (3) both actions involved the same parties or those in privity with the parties, and (4) the issues presented in the subsequent case were or could have been decided *in the prior case*. *Duncan v Michigan*, 300 Mich App 176, 194; 832 NW2d 761 (2013)(emphasis added). The use of the word "and" under *Duncan* requires *all* elements to be fulfilled before the doctrine can be invoked. See *Titan Ins Co v State Farm Mut Auto Ins Co*, 296 Mich App 75, 85; 817 NW2d 621 (2012). Res judicata only bars a subsequent action between the same parties when the evidence or essential facts are identical. *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39, 43; 795 NW2d 229 (2010)(emphasis added).

Collateral estoppel is different. The "doctrine requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008)(emphasis added). Collateral estoppel prohibits relitigation of an issue in a new action arising between the same parties when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in the prior proceeding. *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). To be "actually litigated," a question must be 1.) put into issue by the pleadings, 2.) submitted to the trier of fact, and 3.) determined by the trier. *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 529; 866 NW2d 817 (2014).

ARGUMENT

Fraser Township has missing elements thereby preventing the successful invocation of either doctrine in this case. These are addressed in turn. However, the Court need not reach these multi-faceted issues because the abatement claim is barred by the applicable statute of limitations under Michigan law.

Statute of Limitations

Defendants have had hogs on the property, allegedly in violation of the zoning ordinance, since 2006. **Exhibit J, ¶5.** This sworn fact is consistent with Fraser Township's own recently filed admissions that the hog operation has existed "for the last five years *plus*." **Exhibit K, p. 2, ¶11; see also Exhibit K, p. 5, ¶5** ("the residential neighbors have had to endure *over five years* of horrible stench from the Haney property"). If the neighbors had any issue with the existence of hogging operations, they also failed to bring any action against either defendant on a nuisance theory within the applicable statute of limitations of three (3) years. **Exhibit J, ¶7;** *Mills, supra*. Fraser Township claims this farm operation has continuously constituted a zoning violation—a nuisance per se. MCL 125.3407. The statute of limitations requires a party, including local governments, not to sit idly by but rather timely assert proper claims with the period after it first accurred. To abate a public nuisance, i.e. the existence of Defendants' hog farm in violation of the zoning ordinance, the township was required to bring any such claims within six (6) years of when the wrong *first accrued*. MCL 600.5801(1); MCL 600.5813. Fraser Township was required to bring its claim by 2012; it did not. **See Compl** (dated May 3, 2016). Thus, the statute of limitation applies to bar

the claim of a hog farm existing in violation of the zoning ordinance as a nuisance—regardless of the relief sought.

The complaint also alleges "Defendant (sic) fenced his (sic) property illegally without obtaining a permit. **Compl, ¶9.** It appears the township is referencing Defendant Harvey Haney by use of the pronoun "his" rather than Mrs. Ruth Ann Haney, Harvey's mother. ***Id.*** The last time any fence was installed by Defendant Harvey Haney was in 1999—again, far more in excess of six years. **Exhibit J, ¶6.** Any claim of abatement of a zoning violation as a nuisance per se related to an alleged illegal fence must also be brought within six (6) years else the claim is similarly barred. *Mills, supra*. Fraser Township has failed to do so.

It is undisputed: the sought abatement of a nuisance regarding the existence of the hog farm or the existence of an alleged illegal fence is barred by the statute of limitations. As such, summary disposition in Defendants' favor pursuant to MCR 2.116(I)(1) and (2) is requested.

Res Judicata

As noted above, res judicata requires Plaintiff to show this action and the previously action "involved the same parties or those in privity with the parties." The previous case was filed by the Michigan Department of Natural Resources; the instant case was initiated by Fraser Township. **Exhibit A, p. 1** (see caption). These are not same parties (especially as to Ruth Ann Haney) and Fraser Township has offered no proof or suggestion that these parties—one a local government and the other a state departmental agency—have any privity to each other.

Res judicata also requires "the issues presented in [this case] were or could have been decided in the prior case." Attached as **Exhibit A** is the pleading in the Prior MDNR Case. There is not a single expressed or even implied allegation or mention of hogs and/or the Fraser Township Zoning Ordinance's effect regarding hogs. The Prior MDNR Case was solely about deer and elk (cervidae) under the POC Act. **E.g. Exhibit A; see also Exhibit E.** Also attached as **Exhibits B, C, and D** is the Proposal for Decision, the Final Determination and Order, and the Circuit Court's decision in the administrative action. Again, there is not a *single* expressed or even implied issue of hogs and/or the Fraser Township Zoning Ordinance's effect on hogs. And to state the obvious, a deer or an elk is not the same animal as a hog. Fraser Township has failed to show the issues of hogs and the zoning ordinance' prohibition on hogs was decided, could have been decided, or even raised in the Prior MDNR Case. Simply put, it was not litigated nor decided in the Prior MDNR Case. **Exhibits A, B, C, D, and E**.

Collateral Estoppel

Like res judicata, the doctrine of collateral estoppel requires that Fraser Township show this case has the same parties as in the Prior MDNR Case. *Estes, supra.* It has failed because the parties are plainly different. See **Exhibit A**. Defendant Ruth Ann Haney is not even a named party, let alone Fraser Township. ***Id.***

The doctrine of collateral estoppel estops a party on issues of fact, not of law. If a prior decision result in a *factual* finding, it collaterally estops the party from making a contrary assertion in a second case. So, Fraser Township, by its motion, must show a question *of fact* essential to the judgment in Prior MDNR Case was actually litigated, meaning it must have been 1.) put into issue by the pleadings, 2.) submitted to the trier

of fact, and 3.) determined by the trier it order for collateral estoppel to apply to a disputed fact. *Rental Props Owners, supra.* Fraser Township has failed to show any question of fact essential to a prior judgment involved hogs under the Fraser Township Zoning Ordinance. There is nothing showing of any facts involving hogs and/or the zoning ordinance that were put into issue by the pleadings, submitted to the trier of fact, and determined by the trier in order to utilize the doctrine. The most recent case attached by Fraser Township was never even determine by the trier —it was dismissed. **Exhibit E**. Such an argument fails.

Lastly, Fraser Township fails to meet the mutuality of estoppel requirement. Mutuality of estoppel requires that in order for a party, like Fraser Township, to estop an adversary, like Defendants, from relitigating an issue Fraser Township must have been a party, or in privy to a party, in the previous action. In other words, "[t]he estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him." *Lichon*, *supra*, at 427. Again, Fraser Township was not a party to the Prior MDNR Case or was in privity to the Michigan DNR. E.g. **Exhibits A and E**. A ruling involving the MDNR, had it gone bad for the Michigan DNR, was not binding upon the township at any time in Prior MDNR Case (as it was never a party). Thus, Fraser Township fails to fulfill is required showing of mutuality of estoppel.

Right to Farm Act

The Court needs to be clear what this case really involves. By the pleadings in this case, Fraser Township has alleged, by its complaint, that a hog farming operation being conducted on Defendants' property violates the local township zoning ordinance, which is remedied under a claim of public nuisance per se. MCL 125.3407. Defendants

have pled the *Michigan Right to Farm Act* as an affirmative defense. If the *Michigan Right to Farm Act* applies to Defendants' hog operations (i.e. defendants are within the GAAMPs), the zoning ordinance is completely preempted as to this farm. In simple terms, the "RTFA expressly preempts any local laws, *including zoning ordinances*, that conflict with the RTFA or applicable GAAMPs," *Twp of Williamstown v Hudson*, 311 Mich App 276, 290; 874 NW2d 419 (2015), as

> this act preempt[s] any local ordinances, regulation, or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act.

MCL 286.474(6). The protections of the RTFA are treated as an affirmative defense to a nuisance and/or zoning lawsuit. *Id.* All that must be proved by Defendants is (1) that the challenged condition or activity constitutes a "farm" or "farm operation" and (2) that the farm or farm operation conforms to the applicable GAAMPs. *Lima Twp v Bateson*, 302 Mich App 483, 494; 838 NW2d 898 (2013). If the township's zoning ordinance is preempted, the Court must order Fraser Township to pay Defendants "the *actual* amount of costs and expenses determined by the court to have been reasonably incurred by the farm or farm operation in connection with the defense of the action, together with reasonable and *actual* attorney fees." MCL 286.473b. To that end, Defendants have recently propounded several discovery requests seeking to understand why Fraser Township thinks this farm is outside the *Michigan Right to Farm Act*. **Exhibit F**. The legal hill to climb may be steep for this township given that a local doctor of veterinary medicine has opined that the hogs "appeared to be healthy and free of disease" with adequate housing, shelter, food, and water, and Defendants were following "a strict Bio-Security protocol in the husbandry practices." **Exhibit G**. Further,

Dr. Zorn has opined that the grounds "were clean" and "manure being collected daily." ***Id*.** In short, the domestic hogs are found to be "under excellent care." ***Id*.** Fraser Township may dislike farms within its geographic boundaries, given residential sprawl and desired single-family homes and local shops.[5] However, GAAMP-compliant farms are legally protected in Michigan from "any" local ordinance restrictions. MCL 286.474(6). Moreover, any "generation of noise, odors, dust, fumes, and other associated conditions" therefrom are also exempt from local zoning laws. MCL 286.472(b)(2). The question this Court will have to likely answer is whether the *Michigan Right to Farm Act* does what it name provides: giving farmers, like Defendants, the right to actually farm and "protect farmers from nuisance lawsuits" like this one. *Travis v Preston (On Rehearing)*, 249 Mich App 338, 342; 643 NW2d 235 (2002). Discovery (see **Exhibit F**) will reveal why the township thinks it can legally act against hog farmers in light the protections afford Defendants under the *Michigan Right to Farm Act*.

RELIEF REQUESTED

WHEREFORE, it is respectfully requested that this Court to grant summary disposition to dismiss this case for being outside the applicable statute of limitations pursuant to MCR 2.116(I)(1)-(2) without delay. In the alternative, the Court is requested to deny Plaintiffs' motion for summary disposition solely premised on the doctrines of res judicata and/or collateral estoppel.

[5] Cheese and bacon does not grow on trees. A *farmer* provides these raw materials for goods made for the rest of society to enjoy and purchase from those kitschy stores and shops along M-13. See **Exhibit H**.

Date: November 21, 2016

RESPECTFULLY SUBMITTED:

Philip L Ellison

OUTSIDE LEGAL COUNSEL PLC
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pellison@olcplc.com

***Electronic signature authorized by MCR 2.114(C)(3) and MCR 1.109(D)(1)-(2)*

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing document(s) was served on parties or their attorney of record by hand-delivery to each person/counsel as disclosed by the pleadings of record herein, on the

21st day of November, 2016.

Philip L Ellison

PHILIP L. ELLISON
Attorney at Law

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

FRASER TOWNSHIP
Plaintiff,

v.

HARVEY HANEY and
RUTH ANN HARVEY,
Defendants
_____/

Case No.: 16-3272-CH
Honorable Harry P. Gill

AFFIDAVIT

AFFIDAVIT OF HARVEY HANEY

State of Michigan)
County of Bay) ss.

Harvey Haney, being duly sworn, states:

1. I am one of the named defendants in the above-referenced case.

2. The prior case cited by the township's attorney solely involved privately owned deer, as undertaken by the Michigan Department of Natural Resources, and not Fraser Township.

3. I do not today have privately owned deer or elk on the disputed property.

4. Today, I have hogs only, consistent the *Michigan Right to Farm Act*.

5. Since 2006, I have raised hogs on this property.

6. The last time I erected any fence on any property in Fraser Township was in 1999.

7. No neighbor has filed any legal action against me claiming nuisance.

8. If sworn, I could testify competently to the facts contained within this affidavit based upon my personal knowledge.

This is an unsigned copy. The copy containing the original signature has been filed with the court clerk.

_____ _____
Harvey Haney, Affiant Date

Signed and sworn to before me, this _____ day of _____, 2016 by Harvey Haney.

Notary's Signature: _____

Notary's Name: _____ (SEAL) if required

Notary public, _____ County, State of Michigan

Acting in County of _____, Michigan

My commission expires: _____

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

FRASER TOWNSHIP,

Plaintiff,

v

FILE NO.: 16-3272-CH
HONORABLE HARRY P. GILL
(P26321)

HARVEY HANEY and,
RUTH ANN HANEY,

Defendants.
_____/

BIRCHLER, FITZHUGH, PURTELL & BRISSETTE, PLC
BY: MARK J. BRISSETTE (P26982)
Attorney for Plaintiff
900 Center Avenue
Bay City, Michigan 48708
(989) 892-0591

OUTSIDE LEGAL COUNSEL, PLC
BY: PHILIP L. ELLISON (P74117)
Attorney for Defendant, Harvey Haney
PO Box 107
Hemlock, Michigan 48626
(989) 798-6490

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Defendants' defense in this case rests on the proposition that GAAMPS and the Right to Farm Act trump local zoning. They do not and never have.

If Defendants would be correct what would stop someone in a subdivision from becoming a goat herder or a shepherd with a flock of sheep? What would stop someone who bought a lot in downtown Bay City from becoming a chicken farmer or a hog farmer?

If GAAMPS or the Right to Farm Act trump all zoning, nothing would be protected farming activities under GAAMPS or the Right to Farm Act. Would that even make sense? Of course not because GAAMPS and the Right to Farm Act do not trump all zoning. The Right to Farm Act does protect a farmer in an agriculturally zoned area from being rezoned out of existence, but that is not our case here.

Since the late 1970's when Fraser Township enacted a zoning ordinance, Defendants' land has been zoned for commercial use. That zoning has never changed.

Let us examine an important case, *Jerome Township v Melchi* (1990) 184 Mich App 228. In 1965 Jerome Township enacted a zoning ordinance. Defendant's property was zoned residential. It's prior use had been for farming. (strawberries, tomatoes, raspberries…) In 1979 Defendant established an apiary. It was registered with the Michigan Department of Agriculture. In 1987, Defendant replaced a split rail fence with a stockade fence. It appears that nine years after the establishment of the apiary in 1988 Plaintiff Township sued to get an injunction prohibiting Defendant from operating an apiary and for a fence ordinance violation. The Trial Court denied relief to the Township relative to the apiary but granted relief relative to the fence ordinance.

The Defendant contended that the Michigan Right to Farm Act MCL 286.471 protected the apiary from being enjoined as a nuisance per se. The Court of Appeals found that the maintenance of an apiary constituted a farm or farm operation for purposes of the Right to Farm Act. The Court of Appeals found that the apiary did not exist prior to the 1965 enactment of Plaintiff's zoning ordinance and thus was not protected by the Right to Farm Act and reversed the Trial Court. Additionally, notice the nine year gap between the establishment of the apiary and the suit filed by the Township. There was no statute of limitations bar to the proceeding.

It is unquestioned that Defendants in the instant case did not raise hogs on their property prior to the enactment of the Fraser Township zoning ordinance. Defendants did not own the property when the zoning ordinance took effect. Since Defendants have an illegal farming operation there is no way GAAMPS or the Right to Farm Act can protect Defendants. As a side note, the *Jerome Township* case arose in Midland County.

Let us examine Defendants' apparent gold standard case *Lima Township v Bateson* 302 Mich App 483 (2013) In that case the Township sought an injunction because Defendants were storing heavy equipment on Defendants' property which was zoned for agriculture and consisted of 30 acres. (Oh, did Defendants Haney forget to mention Defendant Bateson's property consisted of 30 acres and was at all times pertinent zoned for agriculture? Why, yes, Defendants Haney forgot to mention that.) Defendant Bateson indicated that he intended to start a tree farm, dig a pond, put in irrigation, lay sod, lengthen the driveway, and eventually start a farm market and needed the heavy equipment for that reason. So, he was protected under the Right to Farm Act. The Trial Court granted Lima Township's Motion for Summary Disposition. The Court of Appeals reversed the grant of Summary Disposition.

In analyzing Lima Township, the fact that the Defendant had a 30 acre parcel which was zoned for agriculture made all the difference. One could safely say that if Defendant Melchi in the Jerome Township case had a 30 acre parcel zoned for agriculture the Court of Appeals reasoning would have been different. In the instant case, Defendants Haney do not have a 30 acre parcel zoned for agriculture. They do not have any parcel zoned for agriculture.

The Right to Farm Act does not purport to trump zoning. See *Village of Peck v Hoist* (1986) 153 Mich App 787 and Michigan Attorney General Opinion 1984 No. 6222 p 295. MCL 286.473(2) says a farm shall not be deemed a nuisance if it would not have been a nuisance prior to a zoning change. But see *Jerome Township* for the proposition that the type of farming would have to stay the same as before the zoning change.

Defendants' Right to Farm claim and GAAMPS claim fall flat. They are totally unsupportable.

Likewise, Defendants claim of a statute of limitations argument has a huge impediment in *Jerome Township v Melchi* where Defendants apiary was started in 1979 and suit was filed in 1988. If there had been a statute of limitations problem for the Township, the Court of Appeals could have easily addressed it in favor of Defendant Melchi if the Court of Appeals thought it was appropriate to do so.

Relative to the statute of limitations argument. The Defendants rely on Exhibit K that the neighbors have had to endure over five years of horrible stench from the Haney property to bolster Defendant's argument. Nowhere in Exhibit K does it say that for over five years the stench has come from hogs. The stench came from the illegal deer and elk farm Defendant operated and only recently has the stench transitioned from deer and elk to hogs as the source.

Additionally, Defendants portray the prior action against Harvey Haney as a cervidae act action. Wrong. It was a zoning action. Harvey Haney had his deer and elk farm in Fraser Township on commercially zoned property in violation of zoning. When Harvey Haney applied for a cervidae permit he told the State his operation would be on agriculturally zoned property owned by his father located in Bay County's Garfield Township. He lied to the State to get his permit. The State requires use of a cervidae permit on agriculturally zoned property. If Harvey Haney's cervidae operation had been on a large enough parcel that was zoned for agriculture and otherwise complied with the zoning ordinance, the State would not have pursued any action against Harvey Haney except for GAAMPS violations which did occur.

Defendant cites MCL 600.5801(1) in Support of Defendants' statute of limitations argument. Nowhere in that statute is there support for Defendants' argument. That statute concerns a Defendant claiming title under a fiduciary deed or court ordered sale. There is nothing about this case that concerns anyone claiming title under a fiduciary deed or court ordered sale. If that is what Defendants are claiming there needs to be an explanation and amended pleadings.

However, MCL 600.5801(4) does have some applicability to this case. That section contains the fifteen year statute of limitations in all other cases. In *Terlecki v Stewart* (2008) 278 Mich App 644 the Court concluded that the fifteen year statute of limitations applied to cases where equitable relief was requested. This period makes sense considering the Jerome Township case, supra, where the Township sued nine years after the Defendant established an apiary. The instant case is a suit about land use. The fifteen years in MCL 600.5801(4) is what is applicable, if any section is.

However, it is questionable whether there is a statute of limitations that applies to Township enforcement of a zoning ordinance. In the recent case of *Charter Township of Lyon v Petty and Hoskins* (attached) Court of Appeals number 327685, the Court decided that "whether and when to enforce its zoning ordinance to effectuate this gradual elimination is a matter within a Township's discretion." (The gradual elimination referred to is non-conforming uses. The Court cited *Jerome Township v Melchi*, supra) The Court cited 83 Am Jur 2d 893 §936 and *Randall v Delta Charter Township* 121 Mich App 26, 32 (1982).

Both Petty and Hoskins had operated businesses for decades on land zoned as residential. In 2013 residential neighbors complained about noise which prompted the Township to take action. Both Petty and Hoskins claimed they had operated their businesses for decades without Township interference. Petty and Hoskins raised laches and estoppel defenses. Neither Defendant showed that their property could not be used for purposes under the zoning classification. The Court rejected the defenses and found in favor of the Township.

Similarly with the instant Defendants, not only have they not used their land for agricultural purposes for decades, they have not even alleged the land cannot be used for purposes allowed under the zoning classification. There is no doubt if one overlays the Township of Lyon decision onto the instant case, the Defendants lose.

As far as res judicata is concerned, the Defendants are trying to relitigate what has already been decided not only at the Administrative Tribunal level but also at the Circuit Court level. Plaintiff argues it is in privity with the State of Michigan. The case against Harvey Haney was a zoning case! The zoning was that of Fraser Township. Township officials and their attorney attended all hearings. Township officials testified against Harvey Haney. The Township's Attorney worked closely with the Attorney General. It was decided a) there was no pre-existing use that protected Mr. Haney and b) he had no right to have a cervidae operation on commercially zoned property. He had to have agriculturally zoned property.

Plaintiff does not care if we are talking about deer or hogs. Both require agriculture zoning. Mr. Haney lacks the proper zoning. The stink the neighbors have endured for years is a nuisance much the same as the noise complained of in Lyon Township, supra. However, violation of a zoning ordinance is a nuisance per se.

Case law supports Plaintiff's analysis. In *American Mutual v Michigan Mutual* 64 Mich App 315 (1975) the Court analyzed "whether the facts or the evidence essential to the maintenance of the two actions are identical. If they are, the doctrine of res judicata bars the subsequent action." American Mutual at p325.

The facts and the evidence are the same in the two actions against Haney. The only difference is that in the former the animals were deer and elk and in the latter the animals are hogs. In the former action Haney asserted GAAMPS and the Right to Farm Act trumped zoning. Haney lost. In the former, Haney asserted a prior use exempted him from zoning. He lost. There is nothing different about the facts, law, or evidence between the former action and the instant action. Defendant cannot relitigate these issues. The zoning has not changed.

Plaintiff should be granted summary disposition. What law would support Defendants' maintenance of hogs on commercially zoned property? There is no law to support such maintenance.

Dated: January 10, 2017

MARK J. BRISSETTE
Attorney for Plaintiff

Prepared By:
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STATE OF MICHIGAN

IN THE 18TH CIRCUIT COURT FOR THE COUNTY OF BAY

FRASER TOWNSHIP,

Plaintiff

v

Case No: 16-3272-CH-HG

HARVEY HANEY and RUTH ANN HANEY,

Defendants /

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE HARRY P. GILL, CIRCUIT JUDGE

Bay City, Michigan - Friday, March 3, 2017

APPEARANCES:

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Bay City, Michigan

Friday, March 3, 2017 - at 2:04 p.m.

(Court and counsel present)

THE COURT: This is the matter of Fraser Township v Harvey Haney and Ruth Haney, file 16-3272.

Counsel, may I have your appearances?

MR. BRISSETTE: Mark Brissette for the plaintiff.

MR. ELLISON: Phil Ellison for the defendants.

THE COURT: This is the time and place for hearing. Both parties have motions for summary dispositions in front of me. I have reviewed a--everything, including the cases. I guess I'd like to start with the issue of the statute of limitations.

Mr. Ellison, first of all, I--I don't believe you set that forth as an affirmative defense and--

MR. ELLISON: Okay.

THE COURT: --I think that was before your time.

MR. ELLISON: Well, I was gonna say Mr. Higgs--I took this over and--and, if I recall correctly, it was--I was up against a deadline for filing anyway at that particular point. So, to that extent that I--that it wasn't a part of the affirmative defenses, I would easily move to, you know, amend to add that as an affirmative defense.

THE COURT: I will consider that. I think the law requires me to allow that if I don't find that it is

(indistinguishable), and that is an issue I'd like to talk to you about.

MR. ELLISON: Okay.

THE COURT: You--Section 5813 I believe does say 'except as otherwise expressed and provided--let me make sure I've got the right one here--"all other personal actions shall be commenced within the period of six years after the claims accrue and not afterwards unless a different period is stated in the statute". That applies to personal actions.

MR. ELLISON: Correct.

THE COURT: This is a zoning enforcement case.

MR. ELLISON: The--

THE COURT: There's no law that I'm aware of that says that this (indistinguishable) a personal action.

MR. ELLISON: Well, I guess the question would be is is that--

THE COURT: Except perhaps in Mills which implied--but Mills is, first of all, unpublished and, secondly, that wasn't the issue. It was a private person trying to enforce a ordinance--or nuisance on the basis that it violated an ordinance, which is a whole different kettle of fish.

MR. ELLISON: Correct. I will acknowledge that the--the--the holding for that--the narrow holding for that case was about the private party actions on that. The court of appeals was laying out what I believe is the law and it's-

-and--and they have argued--and they have laid out their--

THE COURT: Well,--

MR. ELLISON: --and I will acknowledge it's dictum.--

THE COURT: Well, their law--their law is dicta, and it's also an unpublished and not binding (sic).--

MR. ELLISON: Correct.

THE COURT: Of more concern to you I think should be the Lyons (sic) Township case, which didn't specifically address the statute of limitations, but very clearly said that zoning--and let me see if I can find it here. There was no lack of paper in this case.

MR. ELLISON: No, that's for sure.

THE COURT: They talk about zoning, the--that they were, essentially, the defendants asking the court to estop or find--to estop the township from moving forward we--on the basis of laches--latches. They didn't raise the statute of limitations which might be because it was understood it did not apply. Who knows? But one thing they said in Lyons (sic), which is going to be published and is precedential, they talk about the goals of zoning ordinances based on that famous U.S. Supreme Court, Euclid v Ambler Realty. The citation is within the case, 272 US 365. I'm not gonna read the whole citation: "A local unit of government may provide by a zoning ordinance for the regulation of land

development***", so on, so forth. And then, Lyon says: "To achieve these goals, it is the policy of this state and a loca--and a goal of zoning that uses of property not conforming to municipal zoning ordinances be gradually eliminated" (sic), quoting Jerome Township v Melchi, 184 MA 228 (1990). And then: "Whether and when to enforce its zoning ordinance to effectuate this gradual elimination is a matter within a township's discretion".

MR. ELLISON: Two--two points I would make in response to that. One is nowhere in Lyons (sic) does it say that it has discretion outside of the requirements of the zoning regulations--or of the statute of limitations, excuse me.--

THE COURT: Well, the--the--the--the--the--this had been there for years, like 20, 30 years.

MR. ELLISON: Well, the problem is is that there's nothing in that case that I saw that dealt with the fact that whether Section 5813 applies. Now, they want to--and I--I would argue and I would acknowledge that they have discretion to enforce it on day one, year one, year three. They don't have discretion to enforce it after year six.--

THE COURT: If it's a personal action, which brings us to another issue.

MR. ELLISON: Well, that's--and I was just gonna--I'm glad you asked me. That's exactly what I was gonna pivot

to. I filed a reply brief with this court that cited the Attorney General v Harkins case. And that was a case that dealt with the enforcement of--

THE COURT: A permit under--

MR. ELLISON: --a permit under the Wetlands Act.--

THE COURT: Which is a whole different kettle of fish because that was essentially a transactional--they were alleging a breach of a permit. They'd gotten a permit to add beach. Let me find Harkin. Somewhere in here, I have Harkin.

MR. ELLISON: Sure.

THE COURT: It wouldn't be under res judicata, not under the Right to Farm Act. I got it in here someplace.

MR. ELLISON: I understand.

THE COURT: It was un--it was--hum--well, I don't seem to be able to come up with it. But, in any event, I read that case and I read it a couple of times. It's under--they issued a permit under a specific statute, the DNR did.--

MR. ELLISON: Correct.

THE COURT: --And there had been an allegation that the owner of the property had exceeded the scope of the--of the permit. And there was a criminal action, which, apparently, was dismissed. And then some time after the statute of limitations expired, they filed an enforcement action under the permit. And the court found that was

specific--that was a--a personal action and that it was barred by the statute of limitations.

This is not the same kind of a case. This is a zoning case, which I believe the law indicates is an in rem proceeding, which doesn't have a statute of limitations. It's a suit against the property. It's not against--I mean it may be against a--a person, but it's really against the use made of the property. They're not trying to possess it. They're not tryin' to sue for damages. They're suing for an injunction because the use of the property doesn't conform with the zoning ordinance. That is an in rem case, and I would ask you to comment on--we came up with this case, so I'm not sure you're familiar with it, but--City of Detroit v Hasse, or "Hasse", H-A-S-S-E. It's 258 MA 438, which is actually a foreclosure of taxes. I think there were 31 cases. And that's not what we're dealing with here, but the court does spend a great deal of time drawing a distinction between personal actions and in rem actions, finding that the statute of limitations doesn't apply to a municipality seeking to foreclose on a tax--failure to pay taxes because it's an in rem proceeding. I think that's what this is.

MR. ELLISON: I--I would--

THE COURT: Tell me why I'm wrong.

MR. ELLISON: I would respectfully disagree. This

is not an in rem action because the action that's being sought here is not being s--sought against any sort of particular aspect of the property. They're seeking to enjoin the actions of the farmer, the actual--

THE COURT: Actions--

MR. ELLISON: --the actual existence of the pig--the pig farm and its operations are sought to be enjoined. They're not seeking to re--to add something to the land, change the description of the land, change the--the Title to the land--

THE COURT: They're trying to cease the activity on the land because it doesn't conform with the zoning ordinance.

MR. ELLISON: Correct. It's trying to seek to the--I--I believe--

THE COURT: Regardless of who's doing it.

MR. ELLISON: But they haven't sought against everyone. They've sought against two specifically-defined individuals. They did not bring the action against the property itself.

THE COURT: Well, you don't have to, do you?

MR. ELLISON: Well, I--I d--I respectfully disagree. That's why we have cases, for example, like when we see cases like People v A Quantity of Marijuana, People v A Quantity of whatever, of boats, of cars, of things of that

nature, 'cause, if that was the case, then all those cases would be brought against the owners of those properties.--

THE COURT: I don't think it's quite that simple. In Hasse, or Hasse, the court quoted from Black's Law Dictionary:

> "An in personam action is one that seeks to enforce an obligation imposed on the defendant by his contract or (indistinguishable). That is, it is a contention that he is bound to transfer some dominion or to perform some service or to repair some loss. In common law, an action brought for the recovery of some debt or for damages for some personal injury in contra distinction to the old real actions which related to real property only".

In contrast, the term "ac--the term "action in--in rem" signifies an action determining the Title to property which doesn't--that's not what this is about--and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property. And that's what they're trying to do here, is to say that there is an activity that violates the zoning ordinances and no-one has a right to u--conduct that activity on his property. That's all they're seeking to do.

MR. ELLISON: Again, I would respectfully disagree, Judge. What they're seeking to do here is they have filed an

action, not against the property, they've filed an action against the persons for the activities that--that they're claiming these individuals are doing on that property.

So, you know, I guess the point I would point out, Judge, is that the--the only two cases that I think that somewhat deal with this--and I'd have to review Hasse a little closer. I'm not familiar with Hasse off the top of my head standing here today. But the--the two cases that I've pointed to, Mills and Harkins, both--

THE COURT: Well, Mills--Mills isn't even precedential. It's not--

MR. ELLISON: I--I understand. But it is--could be--could be persuasive, and I'm--and I'm--I'm arguing to the--that's it's pursua--should be persuasive to you, your Honor. And if--if you just--I mean, obviously, you can de--decide otherwise. But the two cases that deal with the aspect of government trying to enforce a regulation--

THE COURT: Harkins is a DNR permit, correct?

MR. ELLISON: Correct, Harkins is a DNR permit and Mills is--Mills was discussing it in terms of personal, but it laid out the law that's applicable.

If you're going to take the--if you're gonna take that argu--that presumption as a--as a standard to say this is the--this is the--zoning has--is not a personal action, then there is no statute of limitations.--

THE COURT: That--that's--that's what, in my judgement, Lyons (sic) said. Even though they weren't dealing specifically with the statute of limitations, that's what they said, is an--is that the--it's within the province of the admin--of the municipal government to decide when to enforce these laws.

MR. ELLISON: But they can enforce that--say--say something that went wrong--and I--I mean just as a hypothetical, Judge. Say that somebody back in 1920 did something to that--was doing something to that property back then, okay, and that--and the--that activity--and--and the remem--remembrance of--or the remnants of that activity stayed on that property through today, the--the--if we take the standard that you're applying here in this aspect, then my--my clients would be responsible for all actions that occur on the property from the history of time forward here.

THE COURT: Their only responsible for activities that are taking place at the current time. What Lyons (sic)--

MR. ELLISON: If you're saying the--their activities, I guess that's what I'm getting at.

THE COURT: Well, whatever's happening on the--on the premises, they're--they--the fact that they're sued as human beings, you have to give notice even in a People v 74 Grow Lights. You have to give notice to the people that have

interest. They are suing to regulate an activity that they claim under the zoning ordinance is unlawful, regardless of who is doing it.

MR. ELLISON: Your Honor, I--I respectfully disagree, that you're reading the statute of limitations incorrectly. The way I read--the way I read--and I guess I want to just be clear for the record, and I respect you having given me the opportunity to suss this out with you here today, but 5813 says that person--all other personal actions--and this is an action against persons. They have filed a legal--and I--and I know you--you disagree with me. But I want to be clear for the record. I--it's my position today that this is an action against individuals. They have not--the township has not brought this claim against the property. And, as a result, it's a personal action against two individuals who are owners of property and the--what they're seeking to do is not to change or alter the status of the land, but they're trying to stop the activities of the persons that are conducting what they believe is a violation of the zoning ordinance. And--and, under--I believe Mills and Harkins both support the position that--that statute of limitations doesn't just apply to individuals, it applies to governments as well.

And if this Court is going to say that zoning is at the sole discretion forever and ever of the--of the zo--of a

zoning--or of a--of a government--

THE COURT: I didn't say that, Lyon--the court of appeals said that in Lyons (sic) just last year.

MR. ELLISON: Well, I--I respectfully disagree, your Honor. And I--and I--I--I think I've stated my position here clearly today that, if that's the case, and I acknowledge that would make Mills wrong and that would make Harkin (sic), I don't see the distinction that you're making here in this aspect. The question is the time frame that a body can enforce a wrong--to correct a wrong. They're alleging the wrong occurred and began and--many years ago, and that they've sat on their hands since 2006 to--now, supposedly, all these years later, they're now trying to enforce the existence of a pig farm.

Now, the problem here is, Judge, is that, under the Continuing Wrong Doctrine, they may have been able to make that assertion today. But the Supreme Court has abrogated that, and it says that the wrong accrues at the time that the--that the wrong was--is fully accrued, and that any subsequent harm that falls from that wrong is--does not extend the statute of limitations out forever.

THE COURT: Well, that's assuming that I find that the statute of limitations applies.

MR. ELLISON: Correct. And I'm--I believe--and I believe, Judge, I--and I understand what--what you're

presenting here today, but I think it's a misreading of--the presumption that you're starting with is is that this is an in rem proceeding. And I have not found a single case that has said a zoning action against naming two individuals renders it a in rem proceeding rather than a personal proceeding 'cause, again, they've not named property, they've named individuals.

THE COURT: Anything else you want to--

MR. ELLISON: No, no.

THE COURT: All right.

MR. ELLISON: Your Honor, I would ask you to apply--I guess to be clear for purposes of the record, I'm asking you to apply the statute of limitations under 5813 and limit it to the actions for six years and, because this has existed beyond the six-year point, the existence of the pig farm, that the statute of limitations should apply. Thank you.

THE COURT: Mr. Brissette, is there anything you wish to add to that--to--just to that issue?

MR. BRISSETTE: Sure, Judge.

THE COURT: No. I mean you don't need to. I'm just asking you do you need to--if you want to.

MR. BRISSETTE: Judge, the township can't sue a legal description. I mean if we sued a legal description, we'd have to give notice to the owners of that property. I mean that--that would be unheard of to sue a legal

description and give no notice to people who owned the property or have a legal interest in the property. So, we can't operate other than by suing the owners or real estate, which is real estate that is zoned a certain way but is being used improperly.

So, what counsel is saying is that by suing the owners of property, we've made an in rem action in personam, is a huge leap in terms of a legal argument. You--you just can't sue to try to enforce a zoning ordinance by suing a legal description. I think--I think if I did such a thing, I might get laughed out of court, if I didn't also include the owners of that property.

And, if you look at the cases, if you look at Jerome Township v Melchi, which was a Midland County case in its origin. The township sued the Melchis nine years after the Melchis developed an apiary and also certified that apiary through the State of Michigan Agriculture Department. And if anybody had a decent argument about this whole right-to-farm business, it might've been the Melchis. Their property, when--

THE COURT: You're--you're on the Right to Farm Act now. I'm not--

MR. BRISSETTE: Yeah.--

THE COURT: I want to consider that--

MR. BRISSETTE: --I--I've jumped a little bit. But

I'm--

THE COURT: I want to consider that separate--

MR. BRISSETTE: --I'm still trying to incorporate, you know, the facts of Melchi, which was the township sued nine years after the establishment of the apiary. The court of appeals could've addressed the statute of limitations issue, if one existed. But I think it didn't specifically address that because it didn't exist. The township was suing about the use of the land.

If you look at Township of Lyons (sic) v Petty, which was, I think, decided in October of--

THE COURT: Two-thousand sixteen.

MR. BRISSETTE: --2016, if memory serves correct--correctly, those business operations on property that was zoned residential started in the 1960's and 1970's,--

THE COURT: That's correct.

MR. BRISSETTE: --and they had been in operation for decades. I mean how far back is that? Sixties and seventies, forty, fifty years ago.--

THE COURT: When you and I were young men.

MR. BRISSETTE: Yes, that's right. But we could've been day laborers for those folks, although at a young age.

But the--the court looked at all these equitable arguments that Petty raised and--and their investment in a pole barn and a few things like that, or an addition to a

pole barn, and the fact that they had been in continuous operation that whole time, and the court said those are losing arguments. And, here, I don't even buy into this alleged hog farm starting in 2006. No-one in the township saw hogs until recently. The neighbors didn't see hogs until recently. The Department of Agriculture, when they inspected the property didn't--

THE COURT: Well, that's--that's not an issue--

MR. BRISSETTE: --see hogs.--

THE COURT: --unless I find the statute of limitations applies and--during the--have on that--on that--

MR. BRISSETTE: --The--but the--i--if there was a case, a published case, that defeats the defendants' arguments about the statute of limitations or some such beast blocking the township, it would be, in my opinion, looking at the Jerome Township v Melchi case and The Township of Lyons (sic) v Petty case because, in both of those instances, you have clear opportunity for the court to side with the defendant who was claiming the harm by being brought to court by the governmental entity, in both instances, a township, just like we have here. And the court of appeals, in both instances, said 'defendant, that's a losing argument'.

The--the reply brief that I received recently from counsel also mentioned that this Court couldn't rely on Jerome Township v Melchi anymore, it was outdated and it was

worthless. Well, I don't know why that was said because--

THE COURT: Well, I think it was said because Jerome predated abrog--abrogation of the continuing wrongs test. But that's really not--

MR. BRISSETTE: But the court of appeals in The Township of Lyons (sic) v Petty cited Jerome Township v Melchi--

THE COURT: They did. Is it--

MR. BRISSETTE: --for its holding. So, I would think the court of appeals still thinks Jerome Township v Melchi is an important decision in this area.

So, with that said, I--I just think that the wording of the opinion in Township of Lyons (sic) v Petty is such that it just defeats the defendants' argument here.

THE COURT: All right. Anything else, Mr. Ellison, on this subject?

MR. ELLISON: Yes, your Honor. I'd like to just make one clear point. I generally don't like to come up and tell that an argument from opposing counsel's disingenuous but, here, it's disingenuous. The--any time a party asserts the statute of limitations, it has to be--it has to assert that as an affirmative defense in its pleadings and, if it's not raised in the trial court, it's waived. So, this idea that the court of appeals would have eventually reached the statute of limitations part is disingenuous because none of

those cases cited by the Township ever had a party raise the statute of limitations.

Now, I respect your Honor's gonna rule one way or the other whether you apply those here or not, but simply saying because the--the--the Michigan Court of Appeals never grabbed ahold of that at one point somehow adds credence to the fact that the statute of limitations should not apply, I think is--is--is--is completely inappropriate. That--I can stand here today and tell you, your Honor, that I cannot cite a single case other than Mills, and acknowledging the--the--the unpublished nature and the dictum that is part of it--

THE COURT: Is it "dicta" or "dictum"? I've never--

MR. ELLISON: It's--

THE COURT: --never really quite--

MR. ELLISON: --I think it's "dictum" if it's singular and "dicta" if it's plural I--

THE COURT: All right.

MR. ELLISON: --think. But, needless to say, either way, Mills is at least some precedence to support the position that I have an arguable basis for that position.

The Township has not pointed to a single case that has said zoning does--or the statute of limitations does not apply in zoning. And I think the reason is it doesn't exist. So, your Honor, I think you--you are here the first time

perhaps in the history of Michigan jurisprudence, at least as the appellate level that may be concerned, is you're being called to ask that que--to answer that question, 'is zoning subject to the statute of limitations or not'.

Thank you.

THE COURT: Is enforcement of zoning, yes.

I--I find that the statute of limitations, the six-year statute of limitations, does not apply to this action. I do that on the following basis: I find that 50--I've got to find the statute.

MR. BRISSETTE: Good thing this case wasn't about horse products!

THE COURT: Yes. I just had it in my--here we go.

MCL 600.5813 says:

"All other personal actions shall be commenced within the period of six years after the claims accrue and not afterward unless a different period is stated in the statute".

And there is a statute that says the statute of limitations applies to the government.

So, the reason that I hold that it doesn't apply to this particular action is based on the following: I find that this is more in the nature--this is not a personal action. This is more an action against the property, the activity that's happening on the property. I find that on

the basis not by o--on point but by analogy to the Hasse v-- or Detroit v Hasse. I think that's the right name--Detroit v Hasse, 258 MA 438--where the court goes into a long dissertation. And that was in the nature of a case--cases--there were 31, actually, cases where they were foreclosing as a result of unpaid property taxes. And the court talked about personal actions are brought for the recovery of personal property, for the enforcement of the contractor to recover for its breach, or for the recovery of damages for an injury to the person or property. Personal actions are, a-- as to form, either con--ex in facto or ex dilicto as to place tried, local or transitory, as--and as to object--object in personam or in rem.

And then, they talk about in rem actions. They are proceedings and those proceedings encompass any action brought against a person which is an essential--in which-- essential for purpose of suit is to determine Title or to affect interest in specific property located within territory over which the court has jurisdiction.

Actually, the quote I want is on the page before that. Black's Law Dictionary, the court quoted as to personal--in--in personam actions as:

> "To cease to enforce an obligation imposed on by the defendant by his contract or dilectum. That is, it is the contention that he is bound to transfer some

dominion or to perform some service or to repair some laws. In common law, an action brought for the recovery of some debt or for damages or for s--some personal injury in contra distinction to the old real actions which related to real property only".

And then, they talked about in rem proceedings.

And I find that this is an--this an action to affect the interest in specific property located within the township over which this court has jurisdiction. I would say that that's the distinction--that's the reason that in Harkins, the court allowed the statute of limitations to apply, as opposed--as to the State of Michigan and the Department of Natural Resources. That action had been brought under the Natural Resources Environmental--and Environmental Protection Act. The--apparently, no action on the defendant's property could've been taken to change the--I think it was a beach at the lakefront--without permission of the DNR, and a permit was issued. And the allegation against the defendant was that he had gone beyond the parameters of the permit, and they were trying to get redress for--against the defendant civilly for what they said was a breach. They too spent--"they too" being the court, in deciding the statute of limitations applied, went into a deep analysis as to whether it was a--this was a personal action being brought by the DNR, and they found that it was.

Here, plaintiff brought a civil action against defendant, an individual who allegedly failed to comply with portions of part 303 of the NREPA. Plaintiff's injunctive action to require defendant to restore the wetland comes within the meaning personal action as defined by 58--Section 5813 because it seeks to repair some loss. Actions brought by the attorney general on behalf of the government departments are deemed personal actions. And that was the reason that they applied the statute of limitations to dismiss the case.

In this case, it's a zo--a zoning matter that prohibits certain activity. And it's alleged the defendant on those premises is conducting a farming activity in what's zoned as a residential area. That is more akin, in my judgement, to the tax foreclosure cases, an in rem, than it is to a personal action. It's to seek a determination by the court as to the rights of persons to use that property and i--and what way they use that property.

So, I believe also--I suppose one explanation as to why the statute of limitations in Lyons (sic)--Charter Township v Lyons (sic) wasn't addressed by the court is nobody was smart enough to raise it. I don't think that's the reason. I think the reason is better understood by reading what the court said about the nature of zoning ordinances. I've already placed some of this on the record.

But, essentially, they said it is the policy to achieve the goal that they quoted from Euclid, which I think is one of the more prominent Supreme Court cases early on that dealt with zoning. To achieve these goals, it is the policy of this State and the goal of zoning that uses of property not conforming to municipal zoning ordinances be gradually eliminated. They quoted Jerome Township v Malchi, 184 MA 228 (1990):

> "Whether and when to enforce a zoning ordinance to effectuate a gradual elimination is a matter within a township's discretion".

And then they list the citation.

> "Decisions of a planning commission or other similar local agencies concerning whether to enforce zoning ordinances are decisions which are so basic to the operation of a municipality that any attempt to create liability with respect thereto would constitute an unacceptable interference with the emis--with the municipal--municipality's ability to govern (sic)."

And then they go into a discussion as to the equitable defenses raised by the defendant, none of which have been raised here.

So, it is the holding of this Court that the statute of limitations does not apply. And, under the rule, as to that issue, I will grant summary disposition to the

Township. I believe it's MCR--well, I can't find it but I know which rule it is.

MR. BRISSETTE: I think it's 2.116(c)(7).

THE COURT: All right.

MR. ELLISON: (c)--I would agree with that.

THE COURT: All right. You--you didn't ask for it on that basis, but I'm granting it to you on that basis.

MR. BRISSETTE: I asked for summary on the basis of 2.116(c)(7) in my Motion for Summary--

THE COURT: No, no. But there's a provision in the rule--and I could look it up if I had to, I don't think I have to--that allows me to grant on an issue even though you didn't raise it as to that issue. That's what I'm saying.

So, the next issue I think is the Right to Farm Act. And, Mr. Ellison, my question to you there is isn't it all dependent on the farming activity existing for the zoning ordinance?

MR. ELLISON: No.

THE COURT: Why?

MR. ELLISON: The short answer is is if you look at Section 3 of the Act, Section 3(1), it provides that any farm or farm operations that is GAAMP compliant is exempted from all zoning regulations, including--or all--all ordinances, including zoning regulations. And that's the Williamstown Township case.

THE COURT: What about Section 2?

MR. ELLISON: Section 2 is a separate and independent basis that the cour--that precludes local townships from enacting and enforcing ordinances, which is typically known, as I--in the--in the property world that I operate in, as the "grandfather" provision. What that says is that if that--if that existed before a certain time within a certain area, that the township and, ultimately, a court, cannot enforce those provisions. The problem that the township's arguing here is that they're treating these as all one big collective thing, and they are not. They're separate individual ways in which the--that precludes the township from acting. There is no time limitations or temporal rep--contin--contingency upon when the GAAMP compliancy--the GAAMP compliance must be applied.

So, I--and I--and I would point to the--to the question that Mr. Brissette asked and I'd point out to the Court is it possible to put a pig farm in downtown Bay City, and the answer is is "yes", if it complies with the GAAMP requirements. Now, GAAMP requirements, I don't want to--I don't want to give these short shrift. These are very detailed, complex, very highly-drafted-out provisions under--that are issued by the Department--whatever they're callin' themselves now. They keep changin' the name--Agricultural and Rural Affairs or whatever they're callin' themselves

these days, but the Department of Agriculture for the State. If you are GAAMP compliant, you are exempted from zoning.

THE COURT: What is the purpose of Section 2? I'm sure it specifically says it depended on whether it existed before the zoning rule.

MR. ELLISON: Section 2 would be is if you're not GAAMP compliant and you existed before the zoning was amended or enacted, you are exempted essentially from the gradual elimination provisions until you stop with your activities. And then, of course, then you're--then you would be responsible for compliance. The--the Legislature was trying to address two separate and distinctive preclusion activities. So, I would argue, if you're gonna use the zoning ordinance time, when it was enacted or when it was amended, Section 2--or that should be--Section 3(2) is the only provision that is provided for. If you are arguing that you're not--if the township is arguing that it is not--my client has no defense because it's not GAAMP compliant, that's not been established as a matter of law here. And, frankly, I have discovery out to try--try to understand why they don't think they're GAAMP compliant. Maybe we get an admission today or a stipulation today that they are GAAMP compliant.

The problem here, Judge, is that these are separate and distinct. And I can tell you this is not the first time

a township has tried this argument that--to try to treat these as reading these things as "ands" between all of these subsections; they're "ors". They're different aspects that get different sets of preclusion criteria. And as a result here, Judge, the question becomes now is--is--is my client GAAMP compliant or not. And the motion that was today--that was before you today was not a challenge to say that we were not GAAMP compliant.

THE COURT: Let me back you up.

MR. ELLISON: Okay.

THE COURT: What about Jerome Township?

MR. ELLISON: Jerome Township is--is--well, first of all, as I pointed out and you correctly identified earlier--was a mid-90's case that had only Section 1 and--

THE COURT: Early '90's.

MR. ELLISON: --Section 2. I--I'm sorry?

THE COURT: Early '90's.

MR. ELLISON: The early '90's, tha--cor--you're correct. Thank you. Yeah, early '90's, 'cause then it was amended and--and that section was amended by the Legislature in 1995.

THE COURT: Well, that--the section that was amended had to do with continuing wrong.

MR. ELLISON: Continuing wrong, Section 3(3).

THE COURT: But--well, but it also has some merit

as to the issue of Right To Farm Act.

MR. ELLISON: The--the--I would agree. Now, the--here, what the question is is, Judge, is the question that I need to understand from the C--I'm asserting the defense that the Right To Farm Act applies here. So, there's only two ways that I can successfully argue to--you know, two (indistinguishable) ways to argue to you that the zoning is precluded. One is my clients are GAAMP compliant. If they're GAAMP compliant, it's irrelevant as to what time frame is involved. If my client is not GAAMP compliant, then Section 2 comes into play. Section 2 then says if there has--'you are allowed to continue your use as long as there has been change in zoning within a mile and you were otherwise legal before the zoning change'. Okay? M--at this point right now, I believe the strongest argument my client has is Subsection 1. He--

THE COURT: Well,--

MR. ELLISON: --is GAAMP compliant at this point.--

THE COURT: --I want to ask you about Subsection 2. You mentioned the Williamstown Township case v Hudson, which, for the record, is cited at 311 MA 276 (2015). Correct me if I'm wrong, but I don't believe they dealt with any claim that the activity arose after the zoning ordinance in the past.

MR. ELLISON: Correct. And the question there was was Subsection 1.--

THE COURT: Right, because--but--but it wasn't claimed that the zoning ordinance--that the activity occurred after the zoning ordinance. They didn't deal with Section 2 because it wasn't alleged that--that the activity was started after the zoning ordinance was passed. So, how would that be precedent as to whether Section 2 should apply or not?

MR. ELLISON: At this point right now, the short of it is I don't know if it should apply or not right now because I have discovery to understand exactly when did the zoning ordinance come into effect and how did it apply to those within one mile--

THE COURT: Are you disputing when the zoning ordinance came into effect?

MR. ELLISON: I don't even know when it came into effect. I have no--I have no knowledge of that whatsoever. I--and that's why I have pending long-overdue discovery on that. I can't say at this point one way or the other. If those had been produced to me before today, I might've been able to give you a--

THE COURT: All right.

MR. ELLISON: --better answer.

That being said, my clients' primary--and I'm not wi--I'm not willing to concede Section--Subsection 2 yet because I don't know if it applies or not 'cause again discovery remains open. But my clients' primary defense

under the Michigan Right to Farm Act is Section 3(1), which is--

THE COURT: Well, can you cite me a case where--I--I understand we may have to have Mr. Brissette give us some proofs as to when that ordinance passed. But, assuming he can do that, can you cite me case that would stand for the proposition if a zoning ordinance is passed before a farming operation begins, that Section 2 doesn't bar--or give the township authority to stop it under the zoning ordinance, 'cause Williamstown doesn't do that, unless I missed something?

MR. ELLISON: I--I--I--respectfully, Judge, I think you're misreading the--you're coming at this from the wrong direction.--

THE COURT: I know you want me to say that they stand alone and they're not to be read together, but I'm just--I'm asking you if you can show me a case that says that.

MR. ELLISON: Can I show you--well, most of the time, those both aren't brought at the same time normally. So, the answer would be probably "no". The qu--what I'm asserting here is is if either one, num--Subsec--3(1) applies or Section 3--or Section 3(2) applies, if either one applies, the township is barred from enforcing its ordinance.

THE COURT: Okay. I'm asking you--you're

essentially saying if the GAAMA (sic) standards are met by a farmer, Section 2 can't be applied. That's what you're telling me.

MR. ELLISON: Section 2 doesn't need to be reached is what I'm saying.

THE COURT: Yes. And I'd like you to tell me the name of a case and the citation that stands for that proposition.

MR. ELLISON: I'm not aware of any standing here today. The--the--it's the--by--by reading the plain language of the statute itself provides that, your Honor. Looking at--again, I guess--I guess--I don't know if--and I'm not trying to be facetious here or anything like that. I'm pointing out that the plain language of the statute itself, most of the time, these--these types of zon--these types of Right to Farm Acts only appear to the higher courts under one of those three sections. They don't all come in at the same time. So, this is not where the--the court of appeals looks at this and says 'oh, we have to analyze this as treating the whole operation under all of these'. My client only has to prove one of those and the ordinance--now, not the whole ordinance, just the ordinance as it applies to that piece of property is exempt from--or precluded from being enforced against.

THE COURT: Okay.

MR. ELLISON: So--and--but, however, and I think

we're--we're somewhat puttin' the cart before the horse here today because that--the motion for summary disposition on either side of the Right to Farm Act has not been brought before you today. The only issue today that's here is whether that issue has been--is res judicata or collateral estoppel based on the prior deer case that exists.--

THE COURT: Yes.

MR. ELLISON: --So, I'm--I--I'm somewhat a little bit hamstrung here to answer all of your questions precisely because that was not precisely what the motion that the township brought here today.

THE COURT: I'm gonna give Mr. Brissette an opportunity to answer the issues with regard to res judicata, and e--collateral estoppel. I will tell you that I--I don't believe it does apply.--

MR. ELLISON: Okay.

THE COURT: --That's why I went further.

MR. ELLISON: Okay.

THE COURT: Mr.--anything else on this issue?

MR. ELLISON: I guess the key here, Judge, if you are looking for an answer to your question about how Section--Sub--or Section 3(1)(2) and (3) interact with each other, because that was not specifically raised by the township as part of their motion, and you want--if you want additional, I would request the opportunity to brief that.

THE COURT: I will give you that.

MR. ELLISON: All right. Thank you very much.

THE COURT: Mr. Brissette, let's address res judicata and collateral estoppel.

MR. BRISSETTE: Well, Judge, let me start by asking a question, not necessarily to you. It's--it's rhetorical in nature. What does a licensed deer herd have in common with hogs?--

THE COURT: Well, one thing--

MR. BRISSETTE: --The--the--

THE COURT: --they don't have in common is a statute that highly regulates deer herds.

MR. BRISSETTE: What they have in common though, Judge, is they both require agricultural zoning. Whether you have a licensed deer herd or whether you have a hog farm, they both require agricultural zoning. What does the defendant lack? Agriculturally-zoned property.

And--and there's a fundamental difference here as far as the Right to Farm Act between counsel and myself. I don't think you can find a 50 by 100 lot in downtown Bay City and start a pig farm; he thinks so. That's a fundamental disagreement in our view of the law.

Why I think res judicata applies is, going back to what's the common theme between the licensed deer herd and a hog farm, they both require agricultural zoning. If you look

at what the State of Michigan was doing in its enforcement action against Harvey Haney, is they were trying to enforce the fact with Mr. Haney he didn't have agriculturally-zoned property. He lied on his application to the state in getting a permit for a deer herd, saying he was going to put it on agriculturally-zoned property in Garfield Township, and lied on his renewal application by saying the property in Fraser Township was zoned agricultural, when he knew it wasn't. The administrative law judge found him to have no credibility. Included among his testimony was his--he got a verbal variance from the township, which is probably as believable as getting a verbal right to a concealed weapons carry permit. There ain't no such beast. And, in fact, the township testi--testified at that hearing in front of the administrative law judge, Mr. Mack, there's no such beast as a--

THE COURT: Well,--

MR. BRISSETTE: --verbal variance.

THE COURT: --one question I would raise to you, Mr. Brissette, is this--the Act under which POC (sic)--and what--what's it stand for--the act that you're--that the DNR proceeded under--

MR. BRISSETTE: Which was the Private Serve a Day Operations Act.

THE COURT: That is an activity that cannot exist

except under that statute.

MR. BRISSETTE: That's right.

THE COURT: One of the defenses the defendant raises here is the Right to Farm Act,--

MR. BRISSETTE: Which is--

THE COURT: --which would not be a defense to somebody who didn't get a p--adequate permit from the DNR to raise deer. So, that's one difference that we have between these two cases.

MR. BRISSETTE: He alleged though that, under the Right to Farm Act, he was exempt from whatever the DNR could do. He raised that as a huge issue in the administrative law judge hearing relative to the Right to Farm Act--under the Right to Farm Act, he could have those deer period. And it was decided by the administrative law judge that the Right to Farm Act simply doesn't apply for two reasons. One is he didn't have agriculturally-zoned property. The second reason was the township didn't pull the rug out from under him by rezoning his property while he was farming. And there are two traditional Right to Farm Act type cases. One is--let's--let's take the for instance of somebody having a--a 40-acre farm and they have a dairy herd on it, and the township comes along and rezones it to residential. And they say 'well, you got to get rid of your dairy herd'. And the farmer says 'no, I don't, not under the Right to Farm Act, you can't pull the

rug out from under me'.

The other instance is you got the same 40-acre farm with the dairy herd. Somebody builds a home next to the farm. It enjoins the farm. And they go 'oh, we can't stand the smell of that cow dung', and they sue. And the farmer says 'well, under the Right to Farm Act, I've got the right to--to--to farm'.

And those are the two traditional scenarios where the Right to Farm Act comes into question and protects the farmer. Here, there never was a farm. The administrative law judge found it had been a junkyard prior to the zoning ordinance zoning it commercial. And it has been zoned commercial since the 1970's continuously. The property has never changed in terms of its zoning. And, in fact, I think it was brought out in the administrative law judge's opinion, based on the testimony the township offered at that hearing, that he knew it was commercially-zoned when he applied for a permit for a pole barn back ages ago. It was right on the permit, "zoned commercial". Hard thing to miss.

So, the township has never tried to pull the rug out from under Mr. Haney. They never changed the zoning ordinance. It's been continuously zoned since the 1970's. And I--actually, the township officials who are here brought, if you'd want to see it, a township map, zoning map, from 1972 showing Mr. Haney's property as being zoned commercial.

So, in terms of--of--of the Right to Farm Act argument, it is the same argument that was being used in the DNR matter which was brought up on appeal in front of Judge Schmidt. He affirmed the administrative law judge's ruling and findings. And it is being used in the same way. And my argument is the--the township is privy to the State of Michigan from the standpoint of the State of Michigan indirectly enforcing the zoning of Fraser Township. In fact, I think in Judge Mack's findings, he said that the State of Michigan was acting as the township's agent. That was the argument of Mr. Haney. And, indirectly, they were enforcing the township zoning ordinance because it was being abused by Mr. Haney, and the--the permit should never have been granted in the first place, much less continued. But they issued a permit and the--the grounds for that permit existing were found not to exist, which was you need to have agriculturally-zoned property.

So, I think we stand as in privy with the State of Michigan. We have the same defendant raising the same Right to Farm argument relative to hogs versus deer. But if you look at both hogs and deer, what do they both need? They both need agricultural zoning. What is the defendant lacking and always has been lacking? Agricultural zoning.

THE COURT: And, Mr. Ellison, anything you wish to say?

MR. ELLISON: Two points. One, Judge, I'm not gonna harp on--I think you correctly identified the concern that I have which is these are two different animals. The stu--the two statutes are two different animals. The--and that the--these are different statutes, different issues.

I just heard counsel argue that these parties are in privity to each other. And, again, if that's the case, Judge, I think we have a problem because you just ruled this is an in rem-like jurisdiction and that these parties then that are before you, Mr. Haney may have been a party to the previous case, but he certain--certainly Ruth Ann Harvey (sic) wasn't privy--wasn't privy to that previous case. So, I want to be clear that these are two defendants and you have to treat these two separately.

But I think more importantly, Judge, is that these--the State and the township are not in privity to each other. They've produced no evidence of that. And I know Mr. Brissette just came up here and said 'well, we think they are'. That's not good enough. You have--you have certain elements that have to be proved. In addition to all of that--so that--just on the party issue alone, I think it precludes this. But I also think you've i--correctly identified that these are two separate distinct things and that they may ultimately prevail, but they don't get to prevail because they previous--because the State of Michigan previously

didn't renew a license on deer. You don't get to prevail on pigs on a zo--a local zoning ordinance.--

THE COURT: Well, they actually revoked the license.

MR. ELLISON: Well, revoked though didn't--right.

So, anyway, for those purposes, Judge, and based on my brief, I would ask you to deny the motion.

THE COURT: All right. I don't think that it's appropriate to apply the doctrines of res judicata or collateral estoppel. The other action was a specific action under MCL 287.951. That is a statute which highly regulates the raising of deer, elk, moose, reindeer, and caribou. It was an administrative proceeding. While there may be an overlap on the issues, I do not find that it would be appropriate to apply either doctrine. So, I will deny that motion. I will not grant summary disposition on the basis of res judicata or collateral estoppel.

There are some discovery issues. But are there any other issues of substance that I have not addressed?

MR. BRISSETTE: Judge, I think we can handle the discovery issue. We've talked. We'll set up a time, preferably at the township hall, for counsel to come and review documents.

THE COURT: Well, you're go--if you're gonna proceed on the Right to Farm Act, you're gonna need to make

some filing with the court of that statute.

MR. BRISSETTE: Pardon?

THE COURT: If you're going to proceed on any future motion with the Right to Farm Act, you're gonna have to establish it--that that's--or when that ordinance was passed and--

MR. BRISSETTE: Right.

THE COURT: --what it said. So, I wouldn't think there should be an issue. I mean--

MR. BRISSETTE: Yeah.

THE COURT: --I would certainly think you'd have to provide the Court with a copy,--

MR. BRISSETTE: Oh, absolutely.

THE COURT: --and you probably should provide him with a copy as well.

MR. BRISSETTE: Sure.

THE COURT: All right. I think this--this was supposed to be a status conference as well, which I think we should go talk about and set some dates.

MR. BRISSETTE: Fine.

MR. ELLISON: Judge, if I may, we--we have it as cross-motions, as a protective order and a motion to compel. I guess what I would propose would be--I don't want to seem--seem that the record reflect I'm waiving any of those issues. Perhaps, what we could do is we could adjourn this out a

couple of weeks, six weeks or whatever--

THE COURT: You could renotice it--

MR. ELLISON: We'll renotice it or withdraw it if we--if everything gets resolved.

THE COURT: Fair enough, Mr. Brissette?

MR. BRISSETTE: Yes.

THE COURT: Okay. That's what we will do with the discovery motions. All right.

So, should we go back and meet--

MR. BRISSETTE: Sure.

THE COURT: All right.

(At 3:04 p.m., proceedings concluded)

STATE OF MICHIGAN)
) ss
COUNTY OF BAY)

I certify that this transcript, consisting of 43 pages, is a complete, true, and correct transcript, to the best of my ability, of the proceedings and testimony taken in this case by Mary E.A. Walsh (CER-6965) on Friday, March 3, 2017.

April 11, 2017

Carolyn S. Wittbrodt (CER-0659)
Certified Electronic Recorder
212 Sharpe Street
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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

FRASER TOWNSHIP
Plaintiff,

v.

HARVEY HANEY and
RUTH ANN HARVEY,
Defendants

Case No.: 16-3272-CH
Honorable Harry P. Gill

ORDER

/

MARK J. BRISSETTE (P26982)
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AT A SESSION OF THE ABOVE-COURT HELD IN THE COURTHOUSE
IN THE CITY OF BAY CITY, COUNTY OF BAY

PRESENT: Honorable Harry P. Gill, Circuit Court Judge

ORDER DENYING BOTH CROSS MOTIONS FOR SUMMARY DISPOSITION AND ADJOURNING DISPUTED DISCOVERY MATTERS TO A FUTURE DATE AT THE OPTION OF ANY PARTY

Upon Plaintiff FRASER TOWNSHIP's motion for summary disposition on the basis of res judicata and collateral estoppel, the motion is hereby DENIED for the reasons stated on the record.

Upon the HANEY Defendants' motion for summary disposition on the basis of statute of limitations, the motion is hereby DENIED for the reasons stated on the record.

Upon the understanding of the parties provided upon the record, Plaintiff FRASER TOWNSHIP's motion for protective order and HANEY Defendants' counter-motion to compel discovery is hereby ADJOURNED to a future date and time by either party re-noticing, if self-resolution the current discovery issues are not self-resolved.

IT IS SO ORDERED.

Date: 3-21-2017

P26321
Honorable Harry P. Gill, Circuit Court Judge

Order prepared by: Philip L. Ellison (P74117)

STATE OF MICHIGAN

COURT OF APPEALS

TOWNSHIP OF FRASER, Plaintiff-Appellee,	UNPUBLISHED December 20, 2018 APPROVED FOR PUBLICATION January 17, 2019 9:00 a.m.
v	No. 337842 Bay Circuit Court
HARVEY HANEY and RUTH ANN HANEY, Defendants-Appellants.	LC No. 16-003272-CH Advance Sheets Version

Before: SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff filed this suit seeking injunctive relief to abate a public nuisance. Plaintiff claimed that defendants' piggery violated the zoning ordinance applicable to defendants' property (the land was zoned as commercial and not agricultural). Defendants filed a motion for summary disposition under MCR 2.116(C)(7) (claim barred by statute of limitations). The trial court denied defendants' motion, holding that this was an action in rem and that therefore the statute of limitations did not apply. Defendants appeal by leave granted.[1] We reverse the decision of the trial court and remand the case to allow defendants to amend their responsive pleading to include the statute of limitations as an affirmative defense.

I. FACTS

On May 3, 2016, plaintiff filed this action against defendants, alleging that defendants were raising approximately 20 domestic hogs on their property in violation of plaintiff's zoning

[1] *Fraser Twp v Haney*, unpublished order of the Court of Appeals, Docket No. 337842 (September 18, 2017).

laws and that defendants were creating a nuisance due to the stench and flies drawn by deer[2] and hog waste. Defendant Harvey Haney testified that privately owned deer or elk were no longer on the subject property, but he admitted that he began raising hogs on the property in 2006. Plaintiff offered no evidence that defendants continued to bring new hogs onto the property after 2006 or that defendants had actually begun to raise hogs on the property after 2006. Plaintiff sought an injunction precluding defendants from continuing to raise hogs (or other animals that would violate plaintiff's zoning ordinance) on the subject property.

Defendants filed a motion for summary disposition, arguing that plaintiff's claim was time-barred by the six-year general period of limitations set forth in MCL 600.5813. The trial court denied defendants' motion, reasoning that the statute of limitations did not bar plaintiff's complaint because the case constituted an action in rem.

II. STANDARD OF REVIEW

This Court reviews de novo motions for summary disposition under MCR 2.116(C)(7), the applicability of a statute of limitations to a cause of action, and questions of statutory interpretation. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007).

III. ANALYSIS

A motion for summary disposition under MCR 2.116(C)(7) may be raised on the ground that a claim is barred by the statute of limitations. In support of a motion under Subrule (C)(7), a party may provide affidavits, pleadings, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). Unlike a motion brought under Subrule (C)(10), "a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). However, the substance of this material, if provided, must be admissible in evidence. *Id*. When reviewing motions under Subrule (C)(7),

> this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted,

[2] Defendant Harvey Haney was previously sued by the Michigan Department of Natural Resources (DNR) in 2015 under the Privately Owned Cervidae Producers Marketing Act (POC Act), MCL 287.951 *et seq*., when it was discovered that he improperly registered his private cervidae (deer) facility—which was apparently located at the same address as the hog-raising operation at issue in the instant case—by incorrectly identifying the zoning of the property as agricultural instead of commercial. Defendant failed to seek a variance, and his registration was ultimately revoked. The DNR sought to permanently enjoin defendant Harvey from possessing cervidae or operating a cervidae livestock operation without a permit and to require him to submit his animals for disease testing. However, the case was ultimately dismissed pursuant to a settlement agreement.

> the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [*Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010).]

"[O]nly factual allegations, not legal conclusions, are to be taken as true under MCR 2.116(C)(7) . . . ." *Davis v Detroit*, 269 Mich App 376, 379 n 1; 711 NW2d 462 (2006).

A. WAIVER OF THE STATUTE-OF-LIMITATIONS DEFENSE

Plaintiff argues that defendants cannot prevail on any statute-of-limitations defense because defendants failed to assert a limitations-period defense in their first responsive pleading. However, this case presents the unusual situation in which the trial court made an express holding with respect to the applicability of the asserted statute-of-limitations defense notwithstanding defendants' untimely invocation. The parties briefed and presented their arguments concerning the applicability of the statute of limitations to plaintiff's claim, though plaintiff did not argue until after this appeal was filed that defendants failed to properly assert the statute-of-limitations defense in their responsive pleading. Under these circumstances, we hold that the trial court tried the merits of defendants' statute-of-limitations defense with plaintiff's implied consent. The issue may therefore be treated as if it had been raised in defendants' pleadings, and it is appropriate to remand the case to allow defendants to move to amend their responsive pleading accordingly.

" '[T]he running of the statute of limitations is an affirmative defense.' " *Dell v Citizens Ins Co of America*, 312 Mich App 734, 752; 880 NW2d 280 (2015) (citation omitted). "Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118." MCR 2.111(F)(3). Pursuant to MCR 2.118(C)(1),

> [w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.

In order for an issue to be "tried" for purposes of MCR 2.118(C)(1), it must be analyzed on its merits by the trial court. *Amburgey v Sauder*, 238 Mich App 228, 247-248; 605 NW2d 84 (1999). The trial court in this case clearly addressed the merits of defendants' untimely assertion of their statute-of-limitations defense, and the parties were given ample opportunity to brief and argue the issue. The issue of the statute of limitations' applicability was therefore "tried." Moreover, a party may give implied consent to the adjudication of an issue by failing to object to the issue before the trial court. *Zdrojewski v Murphy*, 254 Mich App 50, 61; 657 NW2d 721 (2002); *Grebner v Clinton Charter Twp*, 216 Mich App 736, 744; 550 NW2d 265 (1996). In this case, plaintiff did not object until after this appeal was filed to defendants' failure to allege a statute-of-limitations defense in their responsive pleading. Plaintiff briefed arguments against the applicability of the statute of

limitations and presented its case to the trial court. Ergo, plaintiff impliedly consented to the adjudication of the issue. See *Zdrojewski*, 254 Mich App at 61.

MCR 2.118(C)(1) is "liberal and permissive . . . . The only requirement is that the party seeking amendment move to have the court amend the pleadings . . . ." *Zdrojewski*, 254 Mich App at 61. In this case, defendants have not moved to amend their affirmative defenses. Typically, this would constitute a binding waiver of the defense. *Geisland v Csutoras*, 78 Mich App 624, 630; 261 NW2d 537 (1977). Importantly, however, the text of MCR 2.118(C)(1) expressly allows for motions to amend the pleadings to be made by a party "at any time, *even after judgment*." (Emphasis added.) This Court, in *Geisland*, 78 Mich App at 630, held that when one defendant properly asserted a statute-of-limitations defense, the plaintiff was not misled or prejudiced when the other defendants asserted the same defense, and it was appropriate to allow the other defendants to seek leave to amend their answers to include the affirmative defense on remand. This Court in *Jesperson v Auto Club Ins Ass'n*, 306 Mich App 632, 647; 858 NW2d 105 (2014), rev'd on other grounds 499 Mich 29 (2016), held that when the trial court could have granted a defendant leave to amend its pleading to include a statute-of-limitations defense not previously asserted and the defense would have barred the plaintiff's claim, the Court's interest in judicial efficiency enabled the Court to forgo remand and simply determine that the statute-of-limitations defense was not waived. *Id*. Consequently, it does not matter that defendants have so far failed to move to amend their affirmative defenses, as long as a proper amendment ultimately occurs. See *id*.

Notably, if defendants had moved to amend their responsive pleading, the trial court would have been within its discretion to grant such a motion. The *Jesperson* Court stated that "leave to amend pleadings should be freely granted to a nonprevailing party at summary disposition, unless amendment would be futile or otherwise unjustified." *Id*. See also MCR 2.118(A)(2). Aside from futility, other reasons to disallow leave to amend include "undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, [and] undue prejudice to the opposing party by virtue of allowance of the amendment . . . ." *Amburgey*, 238 Mich App at 247. Critically,

> [d]elay, alone, does not warrant denial of a motion to amend. However, a motion may be properly denied if the delay was in bad faith or if the opposing party suffered actual prejudice as a result. Prejudice to a defendant that will justify denial of leave to amend is the prejudice that arises when the amendment would prevent the defendant from having a fair trial; the prejudice must stem from the fact that the new allegations are offered late and not from the fact that they might cause the defendant to lose on the merits. [*Id*. (citations omitted).]

Defendants' assertion of the statute-of-limitations defense would not be futile. Further, because plaintiff was given the opportunity to brief and argue before the trial court its position against defendants' assertion of the statute of limitations, it can hardly be said that plaintiff would suffer prejudice were we to allow defendants to amend their responsive pleading. "The mere fact that an amendment might cause a party to lose on the merits is not sufficient to establish prejudice." *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 5; 687 NW2d 309 (2004).

This Court's decision in *Ostroth* is perhaps most instructive. In that case, this Court considered whether a trial court erred by allowing a defendant to amend its affirmative defenses to include the statute of limitations. *Id*. The defendant failed to assert the defense in its responsive pleading and did not move to amend its affirmative defenses to include the defense until after it was raised in the defendant's motion for summary disposition. *Id*. Because the defendant's untimely action was not the result of bad faith or undue delay and did not prejudice the plaintiff's ability to respond to the issue, this Court affirmed the trial court's grant of the defendant's motion to amend. *Id*. Accordingly, because there is no indication that defendants in this case asserted the statute-of-limitations defense in bad faith, the delay in filing a motion to amend defendants' affirmative defenses would not be sufficient to warrant denying such an amendment. See *id*.; *Amburgey*, 238 Mich App at 247.

B. THE APPLICABLE PERIOD OF LIMITATIONS

Having determined that defendants' attempted assertion of the statute-of-limitations defense is proper, it becomes necessary to determine the period of limitations applicable to plaintiff's claim. Plaintiff's claim is for the abatement of a public nuisance.[3] In *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346, 383; 760 NW2d 856 (2008), this Court held that a claim for the abatement of a public nuisance filed by a governmental entity seeking injunctive relief was subject to the six-year general period of limitations under MCL 600.5813. Ergo, the applicable period of limitations in this case is six years.

Under MCL 600.5827, "the period of limitations runs from the time the claim accrues." Because there is no statutory provision holding otherwise, this claim "accrues at the time the

[3] Michigan has historically recognized public nuisance and private nuisance as two distinct violations. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. It evolved as a doctrine to resolve conflicts between neighboring land uses." *Id*. at 302-303 (citation omitted). "[T]he gist of a private nuisance action is an interference with the occupation or use of land or an interference with servitudes relating to land." *Id*. at 303. A public nuisance, in contrast, "involves the unreasonable interference with a right common to all members of the general public." *Id*. at 304 n 8. Plaintiff, a governmental entity, did not specify which type of nuisance it was claiming against defendants in its complaint. Notably, the mere fact that a condition violates a local ordinance does not render that condition a public nuisance. *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 277-278; 761 NW2d 761 (2008). However, plaintiff's language regarding the stench and flies drawn by deer and hog waste suggests that plaintiff was suing defendants because defendants' piggery interfered with the general public's "health, safety, peace, comfort, or convenience[.]" See *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). The distinction is material, as an action for the abatement of a private nuisance is subject to the three-year statute of limitations under MCL 600.5805(10). *Terlecki v Stewart*, 278 Mich App 644, 652-654; 754 NW2d 899 (2008) (rejecting the application of the 15-year period of limitations under MCL 600.5801(4) to a claim of private nuisance).

wrong upon which the claim is based was done regardless of the time when damage results." *Id.* Plaintiff's suit is for the abatement of a public nuisance that stemmed from the piggery kept on the subject property in violation of a local ordinance. Thus, the wrong alleged for purposes of accrual occurred when defendants first began to keep hogs on the subject property, regardless of when the wrong began to result in recoverable damage. Defendants presented undisputed evidence that they had kept hogs on the property since 2006. Plaintiff filed this suit in 2016, and therefore plaintiff's case was time-barred. See MCL 600.5813.

Importantly, the accrual of plaintiff's claim is not subject to tolling simply because plaintiff may have been unaware that defendants were keeping pigs on the subject property in violation of plaintiff's ordinance. The Michigan Supreme Court, in *Trentadue*, 479 Mich at 391-392, held that the common-law discovery rule was not available as a means of tolling the accrual period prescribed by MCL 600.5827. What is relevant, then, is not when plaintiff learned of defendants' violation, but when the violation first took place.

Plaintiff additionally argues that each day that defendants have continued to keep pigs on the property constitutes a separate violation for which the accrual period begins anew. The Fraser Code of Ordinances, § 1-10(a), codifies this assertion by stating that "[e]ach act of violation [of the code] and every day upon which any such violation shall occur shall constitute a separate offense." However, this Court has "completely and retroactively abrogated" the continuing-wrongs doctrine[4] in Michigan, including in nuisance cases. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 288; 769 NW2d 234 (2009) (holding that the Michigan Supreme Court's decision in *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005), and its progeny rendered the common-law continuing-wrongs doctrine inapplicable in all cases within the state). Further, neither party presented evidence suggesting that defendants were adding new swine to the subject property. Therefore, no new wrongs established a newly accrued cause of action that could salvage plaintiff's argument. Accordingly, plaintiff's contention in this regard is meritless.[5]

Plaintiff next argues that its claim requesting the abatement of a public nuisance is an action in rem and, therefore, the six-year period of limitations is not applicable. This Court, in *Detroit v 19675 Hasse*, 258 Mich App 438, 448; 671 NW2d 150 (2003), outlined the distinction between actions in personam and actions in rem:

---

[4] This is sometimes also referred to as the "continuing-violations doctrine," "continuing-wrongful-acts doctrine," and "continuing-tort doctrine." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 282; 769 NW2d 234 (2009).

[5] Amicus curiae, the Michigan Townships Association, cites *Joy Mgt Co v Detroit*, 183 Mich App 334, 342; 455 NW2d 55 (1990), for the proposition that the continuing-wrongs doctrine has been applied in the context of local ordinance violations. However, *Joy Mgt* was published years before *Garg* or *Marilyn Froling Revocable Living Trust*, and so its holding—to the extent that it applied the continuing-wrongs doctrine—is no longer valid.

> [A]ctions in personam differ from actions in rem in that actions or proceedings in personam are directed against a specific person, and seek the recovery of a personal judgment, while actions or proceedings in rem are directed against the thing or property itself, the object of which is to subject it directly to the power of the state, to establish the status or condition thereof, or determine its disposition, and procure a judgment which shall be binding and conclusive against the world. The distinguishing characteristics of an action in rem is [sic] its local rather than transitory nature, and its power to adjudicate the rights of all persons in the thing. [Quotation marks and citation omitted; alterations in original.]

No Michigan court has ever held that a claim seeking the abatement of a public nuisance constitutes an action in rem. This is not an action against the subject property itself to determine its fate. Rather, it is an action seeking injunctive relief against specific, natural persons to force those persons—and only those persons—to come into compliance with a local zoning ordinance. Ergo, plaintiff's claim is an action in personam subject to the statute of limitations.

Plaintiff next argues that if statutes of limitations apply to actions for the abatement of a public nuisance arising from the violation of a local zoning ordinance, this Court would have stated as much in *Jerome Twp v Melchi*, 184 Mich App 228; 457 NW2d 52 (1990). The fact that a court does not discuss a potentially relevant argument in a written opinion does not bear on the merit of the argument. As previously discussed, that a claim is barred by the statute of limitations is an affirmative defense that must be raised in a defendant's responsive pleading. MCR 2.111(F)(3)(a). It is entirely possible that the statute-of-limitations was simply not raised before the trial court in *Jerome Twp*, or that the issue was not pursued on appeal. In either situation, the statute-of-limitations defense—though it may have been meritorious or, at least, applicable—would not have been analyzed by this Court. Plaintiff cannot prevail based on the fact that an argument was not raised in another case, especially when it is unclear whether such an argument had any bearing on its outcome.

Defendants also contend that the trial court improperly relied on *19675 Hasse*, 258 Mich App 438, to apply the doctrine of *quod nullum tempus occurrit regi* against the six-year period of limitations. As an initial note, the trial court did not appear to rely on this doctrine in any meaningful way when outlining its reasons for ruling against defendants. Regardless, *19675 Hasse* is the only published decision of any Michigan court to discuss this doctrine. It merely stands for the notion that the sovereign is exempt from the operation of statutes of limitations absent express statutory authority stating otherwise. *Id*. at 445-446. As discussed earlier, the Legislature enacted MCL 600.5813, which applies to claims by government plaintiffs seeking injunctive abatement of a public nuisance. See *Dep't of Environmental Quality*, 279 Mich App at 383. Accordingly, the government plaintiff in this case is no longer exempt from the statute of limitations under *quod nullum tempus occurrit regi*. See *19675 Hasse*, 258 Mich App at 445-446.

C. EFFECT ON THE MICHIGAN ZONING ENABLING ACT

Amicus curiae Michigan Townships Association argues that if defendants are allowed to continue to keep and raise hogs on the subject property because the applicable statute of limitations has barred plaintiff's complaint, it would effectively render null the government's power to regulate nonconforming uses of zoned land, MCL 125.3208, and its authority to abate

violations of zoning ordinances as nuisances, MCL 125.3407. This logic is flawed. The preceding authorities do not indicate that defendants may engage in further willful violations of plaintiff's zoning ordinances with impunity. They merely stand for the notion that if plaintiff is to file a cause of action against these—or any—defendants, it must do so within the prescribed period of limitations. While it may appear that plaintiff has a good claim against defendants for violating a local ordinance, the legislation of statutes of limitations represents "a public policy about the privilege to litigate." *Chase Securities Corp v Donaldson*, 325 US 304, 314; 65 S Ct 1137; 89 L Ed 1628 (1945). These statutes exist as a matter of necessity, pragmatism, and convenience. *Id*. "They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay." *Id*. Additionally, contrary to amicus curiae's contention, there is no provision in MCL 125.3208 that time-bars claims against any defendant. Any implication that the six-year period of limitations under MCL 600.5813 conflicts with a limitations period prescribed by MCL 125.3208 is therefore meritless.

We reverse the trial court's denial of defendants' motion for summary disposition and remand the case to allow defendants to move to amend their responsive pleading to include the statute of limitations in their affirmative defenses in accordance with MCR 2.118(C)(1). We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ David H. Sawyer
/s/ Amy Ronayne Krause

Order

September 27, 2019

159181

TOWNSHIP OF FRASER,
Plaintiff-Appellant,

v

SC: 159181
COA: 337842
Bay CC: 16-003272-CH

HARVEY HANEY and RUTH ANN HANEY,
Defendants-Appellees.

_____/

On order of the Court, the application for leave to appeal the January 17, 2019 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals, and we REMAND this case to the Court of Appeals to address whether the published opinion in this case is consistent with the published opinion in *Baker v Marshall*, 323 Mich App 590 (2018).

We do not retain jurisdiction.

t0924

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 27, 2019

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

TOWNSHIP OF FRASER, Plaintiff-Appellee, v HARVEY HANEY and RUTH ANN HANEY, Defendants-Appellants.	FOR PUBLICATION January 21, 2020 9:15 a.m. No. 337842 Bay Circuit Court LC No. 16-003272-CH Advance Sheets Version

ON REMAND

Before: SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

This matter is again before us, now on remand from the Supreme Court. We again reverse the decision of the trial court and remand for further proceedings consistent with this opinion.

In our original opinion, we concluded that the trial court erred by denying defendants' motion for summary disposition under MCR 2.116(C)(7) (claim barred by statute of limitations). *Fraser Twp v Haney*, 327 Mich App 1, 3; 932 NW2d 239 (2019). The trial court had concluded that because this case was an action in rem, the statute of limitations did not apply. We disagreed and remanded the matter to allow defendants to raise the defense. *Id*. Thereafter, the Supreme Court vacated this Court's judgment and remanded the case to this Court "to address whether the published opinion in this case is consistent with the published opinion in *Baker v Marshall*, 323 Mich App 590[; 919 NW2d 407] (2018)." *Fraser Twp v Haney*, 504 Mich 968, 968 (2019). We then permitted the parties to file supplemental briefs on remand. After due consideration, we conclude that our original opinion is consistent with this Court's opinion in *Baker*.

In *Baker*, the defendant asserted numerous affirmative defenses, but not one of fraud. *Baker*, 323 Mich App at 593-594. Rather, fraud was raised for the first time in a motion for summary disposition, which the trial court granted. *Id*. at 594. On appeal, the plaintiff argued that the trial court erred by granting summary disposition on the basis of fraud because the defense was waived by the failure to raise it as an affirmative defense. *Id*. at 594-595. The *Baker* Court ultimately concluded that "[b]ecause the fraud defense is an affirmative defense, the failure to raise it constitutes a waiver of that defense." *Id*. at 598.

There is a crucial distinction between *Baker* and the present case. In *Baker*, when the issue of the plaintiff's fraud was raised in the motion for summary disposition, the plaintiff argued that the fraud defense was waived because it had not been pleaded as an affirmative defense as required by MCR 2.111(F). In the present case, when defendants moved for summary disposition on the basis of the statute of limitations, plaintiff did not argue that defendants had waived the statute-of-limitations defense. It was only after defendants filed their appeal that plaintiff claimed that defendants had waived the statute-of-limitations defense because the defense was not raised in defendants' responsive pleading. *Fraser Twp*, 327 Mich App at 6-7. Because of this distinction, we conclude that our published opinion in this case is consistent with *Baker*.

MCR 2.111(F)(3) provides, in pertinent part: "Affirmative defenses must be stated in a party's responsive pleading, *either as originally filed or as amended in accordance with MCR 2.118*." (Emphasis added.) "When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings." MCR 2.118(C)(1). In *Baker*, because the plaintiff argued when she responded to the motion for summary disposition that the fraud defense had been waived, the plaintiff did not expressly or impliedly consent to try the fraud issue. In contrast, in our case, because plaintiff responded to the merits of defendants' claim that its request for injunctive relief was barred by the six-year limitations period of MCL 600.5813 without claiming that defendants had waived the statute-of-limitations defense, plaintiff impliedly tried the statute-of-limitations defense. *Fraser Twp*, 327 Mich App at 6-7. Although defendants did not raise the statute-of-limitations defense in their responsive pleading, because that defense was tried by the express or implied consent of the parties, it is treated as if it had been raised by the pleadings. MCR 2.118(C)(1). Additionally, we note that because MCR 2.111(F)(3) permits an affirmative defense to be raised by way of amendment, it cannot be concluded that failure to initially raise it in the affirmative defenses forever bars it from being raised.

Finally, we briefly address a point raised in plaintiff's supplemental brief on remand. Plaintiff suggests that it is excused from raising the issue precisely because the trial court chose to address it. In its brief, plaintiff argues as follows:

> Since the Court decided to hear the Motion, Plaintiff's Counsel did not have much choice other than to participate. Telling the Circuit Judge "Gee Judge you should not be hearing this Motion so I am leaving…" [w]ould be disrespectful, stupid, and likely to encourage the Circuit Judge to hold Counsel in contempt. That seems to be what Appellant is saying should have been done. Easy for them to say.

We would agree that walking out of the courtroom in the middle of the motion hearing would indeed be disrespectful and stupid and would possibly lead to a finding of contempt. But the same could not be said of raising the argument that the issue of the statute of limitations was not properly before the trial court. Plaintiff could, respectfully, raise the argument that defendants had not properly pleaded the defense. Indeed, it is an argument that plaintiff could well have put in its

response to the motion for summary disposition and led with at the motion hearing.[1] If the trial court chose to address the issue anyway, then plaintiff could have continued with the hearing and raised the issue again on appeal if necessary, this time having properly preserved the argument rather than waiving it.[2]

For these reasons, we conclude that our original opinion was consistent with *Baker*, and we reaffirm our original opinion.

The matter is again reversed and remanded to the trial court for further proceedings consistent with this opinion and our original opinion. We do not retain jurisdiction. Defendants may tax costs.

/s/ Brock A. Swartzle
/s/ David H. Sawyer
/s/ Amy Ronayne Krause

[1] Not only did plaintiff first raise this issue on appeal in this Court, plaintiff did not raise it in its application to the Supreme Court, nor did it raise any issue regarding a conflict with the decision in *Baker*. Rather, the Supreme Court sua sponte raised the issue.

[2] Conversely, a party is generally not obligated to specifically preserve an objection to an issue raised sua sponte by a court. See MCR 2.517(A)(7); *In re Gach*, 315 Mich App 83, 97; 889 NW2d 707 (2016).